

1           IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
2                           IN AND FOR THE COUNTY OF PIMA

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11           BEFORE:   THE HON. JOHN LEONARDO, DIV. 10

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14           APPEARANCES:

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STATE OF ARIZONA,  
Plaintiff,

vs.

JEFFREY ALLEN WOOD,  
Defendant.

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) 2 CA-CR 2011-0193  
) CR-20093952  
)  
)  
)  
)

DONALD KLEIN  
SANDRA BENSLEY  
appearing for the Defendant

JURY TRIAL - DAY TWO

5/11/11

Deirdre Muzall, RDR, #50012  
Certified Court Reporter

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PROCEEDINGS

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2

3           THE COURT: Good morning. The record will show  
4 the presence of counsel and the defendant, the absence of  
5 the jury. Anything before we bring the jury in?

6           MR. DIEBOLT: No, Judge.

7           THE COURT: And Mr. Diebolt, who will be your  
8 next witness?

9           MR. DIEBOLT: Investigator Friedlander and I  
10 expect him to be my last witness, Judge.

11          THE COURT: Very well. You may bring them in.

12          MR. KLEIN: This can be off the record. We have  
13 three witnesses lined up for this morning which I think we  
14 should be able to finish by noon. And then we have one  
15 witness at 1:30. What I was going to suggest is that  
16 maybe we have him a little bit later and we can try to  
17 settle jury instructions so we don't break after just one  
18 witness.

19          THE COURT: Okay. We will see how the timing  
20 goes.

21          THE BAILIFF: Your Honor, the jury.

22          THE COURT: Please be seated. Good morning,  
23 Ladies and Gentlemen. The record will show the presence  
24 of the jury, counsel and the defendant. The State may  
25 call its next witness.

1                   MR. DIEBOLT: The State calls Investigator  
2 Friedlander.

3

4                   INVESTIGATOR FRIEDLANDER

5    having been duly sworn, takes the witness stand and  
6 testifies as follows.

7

8                   DIRECT EXAMINATION

9                   MR. DIEBOLT:

10

11       Q.    If you would introduce yourself to the jury,  
12 please.

13       A.    My name is Ian Friedlander.

14       Q.    What is your occupation?

15       A.    I'm a special investigator for the Arizona  
16 Department of Corrections.

17       Q.    And, sir, how long have you been in that  
18 position?

19       A.    Nine and a half years.

20       Q.    During that time have you participated in the  
21 investigation of incidents at the Department of  
22 Corrections?

23       A.    Yes, I have.

24       Q.    I want to talk to you about this particular  
25 incident. Did you participate in the investigation of the

1 incident involving inmate Wood and inmate Schwartz?

2 A. Yes, I did.

3 Q. Did you as a part of that investigation do  
4 follow-up interviews of individuals who may have some  
5 knowledge of what had happened?

6 A. Yes, I did.

7 Q. Did you also complete a report with regard to  
8 your findings?

9 A. Yes, I did.

10 Q. Is that report in front of you there marked  
11 State's 14, or is that a copy of it?

12 A. This is a copy of my report.

13 Q. I want to talk to you about, you obviously were  
14 not there when the incident happened; is that correct?

15 A. Pardon me?

16 Q. You were not there when the incident happened,  
17 correct?

18 A. Correct.

19 Q. At some point later were you asked to participate  
20 in an investigation?

21 A. Yes, sir.

22 Q. And as a part of your participation, did you have  
23 the opportunity to meet with inmate Wood?

24 A. Yes, sir.

25 Q. As a part of that meeting did you advise Mr. Wood

1 of his Miranda rights?

2 A. Yes, I did.

3 Q. Prior to meeting with Wood had you also met, or  
4 let me rephrase that; as part of that investigation did  
5 you also meet with inmate Jeffrey Schwartz?

6 A. Yes, I did.

7 Q. At some point during your meeting with inmate  
8 Wood --

9 A. Can I correct? I think you said Jeffrey  
10 Schwartz, I think his name is Bradley Schwartz.

11 Q. Bradley. My mistake, thank you. I want to talk  
12 about your meeting with inmate Wood, Jeffrey Wood; in the  
13 time that you had spent with him you had indicated you  
14 read him his Miranda rights; is that correct?

15 A. Yes, it is.

16 Q. And what happened after that, shortly thereafter?

17 A. Well, shortly thereafter without provocation or  
18 encouragement from myself, Wood spontaneously asked,  
19 quote, how is he doing? Close quote.

20 Wood then said, quote, he didn't mean to hurt  
21 him, close quote, and that he struck the victim only with  
22 his hands.

23 Q. Did you document that information in your report?

24 A. Yes, sir.

25 Q. Was there another investigator with you during

1 that conversation you had with inmate Jeffrey Wood?

2 A. Yes, sir, there was another investigator with me.

3 Q. As a follow-up with Bradley Schwartz, did you  
4 compile a six photo array, one of the photos being inmate  
5 Jeffrey Wood, to show to Bradley Schwartz?

6 A. Yes, I did.

7 Q. What was the purpose of doing that?

8 A. That was the purpose, to obtain an identification  
9 of who the assailant might or could have been.

10 Q. And did Mr. Schwartz, Bradley Schwartz select a  
11 person in that six pack array?

12 A. Yes, he did.

13 Q. How did he describe that?

14 A. Pardon me?

15 Q. Who did he pick?

16 A. He selected the defendant, Mr. Wood.

17 Q. Are you aware of Bradley Schwartz receiving  
18 medical treatment for the injuries he received?

19 A. Yes, sir.

20 Q. Do you recall him receiving or being sent to a  
21 hospital outside the Department of Corrections?

22 A. Yes, sir.

23 Q. Do you know which hospital he was sent to?

24 A. Saint Mary's, and then to Maricopa Medical  
25 Center.



1           Q.    Do you know if he was sent back to Maricopa for  
2 follow-up medical treatment?

3           A.    Yes, sir, he was.

4                   MR. KLEIN:  Judge, excuse me, I am going to  
5 object.  Can we approach?

6

7                   ((Whereupon there is an on-the-record bench  
8 conference.))

9

10                   MR. KLEIN:  Number one, his information is based  
11 on hearsay.  Number two, Schwartz actually went up to  
12 Maricopa County Medical Center for several reasons.  One  
13 was on this occasion but there are also other times he  
14 went up that were totally unrelated to this in connection  
15 with his back and he ultimately had some sort of cervical  
16 surgery, I believe.  So I object to the form and also to  
17 hearsay.

18                   THE COURT:  Where are you going with it?

19                   MR. DIEBOLT:  I am done with it.

20                   THE COURT:  He doesn't seem to be the right  
21 witness.

22                   MR. DIEBOLT:  Right.

23

24                   ((End of bench conference.))

25

1 MR. DIEBOLT:

2 Q. As part of the investigation did you do  
3 interviews with different corrections officers who may  
4 have some knowledge?

5 A. Yes, I did.

6 Q. Did you document, basically summarize what the  
7 information was that was provided to you by the  
8 corrections officers?

9 A. Yes, sir.

10 Q. And is inmate Jeff Wood in the courtroom today?

11 A. Yes, sir.

12 Q. Where is he sitting, what he is wearing?

13 A. He is sitting at the defendant's table.

14 Q. In the middle?

15 A. Pardon me?

16 Q. Is he in the middle?

17 A. Yes, sir, he is.

18 MR. DIEBOLT: Thank you, that's all the questions  
19 I have.

20 THE COURT: You may cross, Mr. Klein.

21 MR. KLEIN: Thank you, Your Honor.

22

23 CROSS EXAMINATION

24 MR. KLEIN:

25

1 Q. Good morning, Mr. Friedlander.

2 A. Good morning.

3 Q. How are you doing?

4 A. Just fine, and you?

5 Q. Thank you, I am doing well.

6 A. Good.

7 Q. The first person that you actually interviewed as  
8 part of your investigation of this whole incident was  
9 Jeffrey Wood, right?

10 A. I must check my report.

11 Q. Sure.

12 A. Yes, sir, I believe that's correct.

13 Q. And that was on October 9th of 2008?

14 A. That's correct.

15 Q. And without any prompting from you, the first  
16 thing he said, basically the first thing that he said to  
17 you was, how is he doing, right?

18 A. He said, how is he doing, that's correct.

19 Q. And the he that he was referring to, given the  
20 context of the meeting, was Mr. Schwartz, right?

21 A. Correct.

22 Q. And he told you that he didn't mean to hurt  
23 Mr. Schwartz, right?

24 A. That's correct.

25 Q. Okay. Then the next day you wound up

1 interviewing Mr. Schwartz, right?

2 A. Correct.

3 Q. That was on October 10th of 2008?

4 A. That's correct.

5 Q. And you have sort of summarized your interview  
6 with him in your report, correct?

7 A. Correct.

8 Q. Have you also had an opportunity to review a  
9 transcript of your interview with Mr. Schwartz?

10 A. No, I don't believe so.

11 Q. Okay. Let me see if I can find it hopefully for  
12 you. I am going to show you what has been marked for  
13 identification as defendant's exhibit 0, if you would look  
14 through that and tell me if you recognize it, please.

15 A. This appears to a transcript of my interview with  
16 Mr. Schwartz.

17 Q. That was on October 10th, 2008?

18 A. Yes, sir.

19 Q. So what, roughly, well, less than a month after  
20 this whole encounter took place, right?

21 A. Correct.

22 Q. When you talked with Mr. Schwartz did he respond  
23 to your questions?

24 A. Yes, he did.

25 Q. Did he appear to have any difficulty

1 understanding your questions?

2 A. I don't remember.

3 Q. Let me ask you, number one, during your entire  
4 interview with him did he ever tell you that during this  
5 encounter with Mr. Wood, Mr. Wood called him any type of  
6 derogatory names?

7 A. I would have to check the transcript.

8 Q. Feel free to do that.

9 A. The transcript indicates that Mr. Schwartz did  
10 not say anything regarding any comments Mr. Wood made.

11 Q. Okay. And when you were talking with him you  
12 were basically asking him to tell you what happened?

13 A. That's correct.

14 Q. Now I think you told Mr. Diebolt that during your  
15 investigation you also interviewed some corrections  
16 officers, right?

17 A. Correct.

18 Q. How many corrections officers do you think you  
19 wound up interviewing in connection with this?

20 A. I would have to refer to my report.

21 Q. I mean just as a ballpark estimate, more than  
22 five?

23 A. I believe so.

24 Q. Was one of your reasons for interviewing them to  
25 find out what happened to Mr. Wood's pants?

1           A.     Yes, that's correct.

2           Q.     And was one of the reasons for talking with some  
3 of these corrections officers and sergeants to find out  
4 what happened to Mr. Wood's shoes?

5           A.     That's correct.

6           Q.     And was the reason you were trying to do that to  
7 see if they could be located?

8           A.     Correct.

9           Q.     And was one of the reasons that you wanted to see  
10 if they could be located was to see if stains could be  
11 tested on them?

12          A.     Correct.

13          Q.     Because, well, we didn't go into your background  
14 but in addition to being a special investigator for the  
15 Department of Corrections, you have also worked in law  
16 enforcement outside of the correctional system?

17          A.     Correct.

18          Q.     I believe you worked as a detective in the State  
19 of Florida?

20          A.     For several years.

21          Q.     So you appreciate the importance of doing  
22 follow-up investigation in a criminal investigation?

23          A.     Yes.

24          Q.     And in particular testing for the presence of  
25 blood?

1 A. Yes.

2 Q. On various pieces of evidence?

3 A. Yes.

4 Q. And testing to see if it can be determined if  
5 something is blood, or whether it is the blood of someone  
6 in particular, right?

7 A. Yes.

8 Q. Okay. And during your investigation you had some  
9 photographs, didn't you, that were taken the day of the  
10 encounter between Mr. Wood and Mr. Schwartz?

11 A. I was provided with photographs.

12 Q. Let me show you defendant's U, T and S and ask  
13 you if you recognize these as three of the photographs  
14 that you reviewed in your investigation?

15 A. Yes, that's correct.

16 Q. Okay. And would you agree with me those  
17 photographs appear to show some sort of stains on the  
18 shoes and a little bit on the pants?

19 A. Yes.

20 Q. And so you were trying to locate the pants and  
21 the shoes to see if they could be, if the stains could be  
22 tested to see if they were actually blood, right?

23 A. Correct.

24 Q. And if they were blood, to see if they were  
25 Bradley Schwartz's blood, correct?

1 A. Yes.

2 Q. But you were not able to find the shoes or the  
3 pants?

4 A. That's correct.

5 Q. So obviously then no testing has been done?

6 A. Correct.

7 Q. And we don't know whether those stains are in  
8 fact blood, correct?

9 A. I don't know.

10 Q. And you don't know whether if they are blood  
11 whether they are Bradley Schwartz's blood?

12 A. That's correct.

13 Q. From your investigation and your talking with  
14 numerous corrections officers, do you know whether any  
15 corrections officer had Mr. Wood remove his clothes to  
16 look for physical injuries underneath his clothing?

17 A. I do not.

18 Q. When you testified about showing Mr. Schwartz the  
19 photographic lineup?

20 A. Yes.

21 Q. When was that done?

22 A. I would have to check my report.

23 Q. Sure. I will take those photographs from you.

24 A. April 15th, 2009.

25 Q. So that was roughly almost seven months after the



1 whole encounter took place?

2 A. Correct.

3 Q. And I don't know that I specifically asked you  
4 these questions so let me just go through them. You don't  
5 know whether any corrections officer took Mr. Wood's shoes  
6 or pants; is that correct?

7 A. That's correct.

8 Q. If they were taken, they have apparently been  
9 misplaced by the Department of Corrections?

10 A. I presume so.

11 MR. KLEIN: I don't have any other questions,  
12 Your Honor.

13 THE COURT: Redirect, Mr. Diebolt.

14

15 REDIRECT EXAMINATION

16 MR. DIEBOLT:

17

18 Q. Investigator Friedlander, were you aware of any  
19 injuries to the defendant, Mr. Wood?

20 A. No, sir.

21 Q. Did you receive any reports that he went to  
22 medical or was treated for anything?

23 A. No, sir.

24 Q. Is it true based on the investigation that it  
25 revealed that inmate Wood admitted to you that he had done

1 this assault?

2 A. Yes, sir.

3 Q. He also admitted to another officer that he had  
4 done the assault?

5 A. Yes, sir.

6 Q. In addition to that, inmate Wood is picked out of  
7 a six pack lineup by Mr. Schwartz?

8 A. Correct.

9 Q. During the conversation or during the time when  
10 you had a meeting with inmate Wood, did he ever say to you  
11 anything about Schwartz attacking him?

12 A. No, sir.

13 Q. Did he ever say that Schwartz hit him on swung at  
14 him?

15 A. No, sir.

16 MR. DIEBOLT: That's all I have, thank you.

17 THE COURT: Does the jury have any questions of  
18 this witness? If counsel would approach.

19

20 ((Whereupon there is an on-the-record bench  
21 conference.))

22

23 THE COURT: Showing you question number one.

24 MR. DIEBOLT: That's fine.

25 MR. KLEIN: Yes, I have no problem with that, I

1 would like to do follow-up.

2 THE COURT: Okay.

3

4 ((End of bench conference.))

5

6 THE COURT: Mr. Friedlander, the jury asked this  
7 question to respond to if you know the answer. Why was  
8 the victim Schwartz transported from Saint Mary's to  
9 Maricopa Medical Center and not just treated at Saint  
10 Mary's?

11 THE WITNESS: The information I have is that his  
12 injuries may have been too serious to be treated at Saint  
13 Mary's.

14 THE COURT: Any follow-up questions?

15 MR. KLEIN: Yes, Judge, if I may.

16

17 RECROSS EXAMINATION

18 MR. KLEIN:

19

20 Q. Investigator Friedlander, when you say the  
21 information that you had, did you wind up receiving  
22 medical records from both of these facilities?

23 A. Yes, I did.

24 Q. And so the information that you had basically  
25 would refer to your review of the medical records?

1           A.     I did not review the medical records to any  
2 extent.

3           Q.     Did you review the medical records to the extent  
4 of seeing that the doctor at Saint Mary's told staff that  
5 he was refusing to work on Dr. Schwartz because he had had  
6 prior --

7                   MR. DIEBOLT:  Objection to the nature of the  
8 question.

9                   THE COURT:  Sustained.

10                  MR. KLEIN:

11           Q.     Did you review any part of the Saint Mary's  
12 report that dealt with the doctor, and I believe his name  
13 is Dr. Emami; do you remember reading anything from the  
14 report concerning Dr. Emami?

15           A.     No, sir.

16                  MR. KLEIN:  I don't have any other questions  
17 then.

18                  THE COURT:  Thank you, sir, you may step down,  
19 you are excused.  Mr. Diebolt, does the State have  
20 additional evidence?

21                  MR. DIEBOLT:  The State would rest at this time  
22 subject to, and I believe I have reviewed the exhibit list  
23 but subject to a review of that I would rest.

24                  THE COURT:  Very well.  That means, Ladies and  
25 Gentlemen, that you have heard all the evidence that the

1 State intends to present in its case in chief. As we told  
2 you at the start of the trial, the defense has no  
3 obligation to present any evidence but they have the  
4 opportunity to do so.

5 Mr. Klein, does the defense wish to present  
6 evidence?

7 MR. KLEIN: Yes, we do, Your Honor.

8 THE COURT: You may call your first witness.

9 MR. KLEIN: Brad Roach.

10 Your Honor, Mr. Roach is not here yet, we can  
11 proceed with Nurse Quattlebaum.

12 THE COURT: You may proceed, Ms. Bensley.

13

14 NURSE QUATTLEBAUM

15 having been duly sworn, takes the witness stand and  
16 testifies as follows.

17

18 DIRECT EXAMINATION

19 MS. BENSLEY:

20

21 Q. Would you please introduce yourself to the jury.

22 A. My name is Lynn Marie Quattlebaum.

23 Q. Can you spell your last name for the court  
24 reporter.

25 A. It is Q. U. A. T. T. L. E. B. As in boy A. U. M.

1 Q. What is your employment, where do you work?

2 A. I'm a licensed practical nurse at the Pima County  
3 State or the state prison.

4 Q. At the Department of Corrections?

5 A. At the Department of Corrections.

6 Q. How long have you been employed in that capacity?

7 A. Just about five years.

8 Q. On September 27th, 2008, where were you employed?

9 A. I was employed at the state prison.

10 Q. That was as a licensed practical nurse?

11 A. Yes.

12 Q. You became aware of an incident involving Bradley  
13 Schwartz and another inmate on September 27th, 2008?

14 A. Yes, I did.

15 Q. When you arrived on scene what did you initially  
16 do?

17 A. First what we do is assess who was involved in  
18 it. When I arrived on the scene the only one in the  
19 immediate area was Mr. Schwartz.

20 Q. Was he at that point treated at the scene?

21 A. We do an initial assessment there and then we  
22 bring them back up to our medical unit in the medical  
23 building.

24 Q. How was Mr. Schwartz moved from the initial scene  
25 to the medical unit?

1           A.     They are escorted by security.

2           Q.     You say escorted, was he on a stretcher, a wheel  
3 chair, walking?

4           A.     He walked independently up to the unit.

5           Q.     At that time were you able to make observations  
6 about Mr. Schwartz's mental state or his orientation or  
7 anything like that?

8           A.     We did that first at the scene by asking him  
9 questions and making sure that he was alert and oriented.  
10 Mr. Schwartz was to person, place and time. He knew where  
11 he was, he answered questions well.

12          Q.     What did Mr. Schwartz tell you about his  
13 consciousness or whether he lost consciousness?

14          A.     Mr. Schwartz said he did not lose consciousness.

15          Q.     So he denied that happening?

16          A.     Correct.

17          Q.     Was there any time that you were with  
18 Mr. Schwartz that he lost consciousness?

19          A.     Not at all. He was alert and oriented the entire  
20 time.

21          Q.     What did you do to care for the bleeding that was  
22 in his nose and lower eye area?

23          A.     The first assessment site, we had just given him  
24 a little bit of gauze to wipe at the nose and I then  
25 brought or they brought him up to West Medical. At that

1 time he asked for something to put across his nose to kind  
2 of help him with, to stop the bleeding. And we gave him  
3 what's called an A. D. D. or a thick gauze pad which he  
4 then put up to his nose.

5 Q. What did Mr. Schwartz do once that gauze pad was  
6 applied?

7 A. He actually blew his nose.

8 Q. What did that do to his eye?

9 A. It forced the left eye forward or it protruded  
10 forward.

11 Q. What do you mean by protrude?

12 A. It actually came forward almost out of the eye  
13 socket.

14 Q. And you were able to see that?

15 A. Yes.

16 Q. What had you already told Mr. Schwartz about  
17 blowing his nose before he did that and blew his nose?

18 A. In the hallway when I gave him the first set of  
19 gauze I instructed him not to blow his nose. We would  
20 prefer that they just apply pressure so that they don't  
21 cause any other damage or create any other problems. At  
22 West Medical that's when he blew his nose.

23 Q. Were you surprised that he blew his nose based on  
24 your understanding of his own medical experience?

25 A. Yes. Very.



1 Q. And why?

2 A. Any time that you suspect that there is damage to  
3 the bones around the eyes or even the nose itself, you do  
4 not blow your nose, that can create more damage or  
5 dislodge any fracture.

6 Q. Did you tell him anything about blowing his nose  
7 after?

8 A. My comment to him actually was, you of all people  
9 should know not to blow your nose in circumstances like  
10 this.

11 Q. What warnings did you have to give Mr. Schwartz  
12 related to that nose dressing and blowing his nose after  
13 you observed what he had done?

14 A. I actually informed him if he was going to  
15 persist in blowing the nose, that I would not give him  
16 anything to stop the bleeding.

17 Q. What kind of comments was Mr. Schwartz making  
18 regarding his medical care, was he giving you input?

19 A. Yes. Mr. Schwartz actually at one point wanted  
20 to see what he looked like. Out at the prison we don't  
21 actually have regular mirrors but they have like a  
22 reflective device they use. We have one in the West  
23 Medical Unit and I had given it to him. And his comment  
24 to me was that he wanted his lawyer contacted and he  
25 wanted a plastic surgeon.

1 Q. Were you able to form an opinion about the amount  
2 of blood loss? Were you able to characterize it on I  
3 guess a scale?

4 A. I would probably term it as moderate. Initially  
5 he was bleeding from the nose and from a wound to the left  
6 eye or eyebrow area. But by the time we had him up at  
7 West Medical and then stabilized before the ambulance got  
8 there, there was no active bleeding.

9 Q. So by the time you had him at West Medical,  
10 that's the second unit, his condition had improved and  
11 there was no bleeding?

12 A. Correct.

13 Q. Where was Mr. Schwartz taken after he was seen in  
14 medical?

15 A. He was actually picked up directly from our unit  
16 by the ambulance unit and they escort them or transport  
17 them to the hospitals. And when they were there and  
18 taking a look at Mr. Schwartz, I actually asked them where  
19 they would be taking him. At the time we had contracts  
20 with Saint Mary's Hospital. But anything deemed trauma  
21 was then sent to UMC. The paramedics checked with their  
22 dispatcher to see where they felt Mr. Schwartz should go.

23 MR. DIEBOLT: I will object to the narrative  
24 nature, outside the scope.

25 THE COURT: Sustained.

1 MS. BENSLEY:

2 Q. Where did he eventually end up being transported  
3 to?

4 A. To Saint Mary's Hospital.

5 Q. Are you aware that he was then transferred to  
6 another hospital after Saint Mary's?

7 A. Yes, he was then transported to UMC.

8 Q. Do you know why?

9 A. We assumed just the injuries.

10 MR. DIEBOLT: I will object as to assumptions,  
11 Judge.

12 THE COURT: Sustained.

13 MS. BENSLEY:

14 Q. Were you aware at all that a doctor had refused  
15 to treat him at that hospital?

16 MR. DIEBOLT: Objection to the form of the  
17 question.

18 THE COURT: Sustained.

19 MS. BENSLEY:

20 Q. What did Mr. Schwartz tell you about the assault?

21 A. He didn't actually say anything to me.

22 Q. Was he able to tell you anything about who  
23 attacked him?

24 A. No.

25 Q. So he made no statements at all?

1           A.     Correct.

2           Q.     I am going to back you up. You said that at some  
3 point he made a request for you to contact someone?

4           A.     Yeah, he had requested that --

5                   MR. DIEBOLT: I am going to object as to the form  
6 of the question, Judge, it's hearsay and non-medical  
7 treatment.

8                   THE COURT: Overruled.

9                   MS. BENSLEY:

10          Q.     Go ahead.

11          A.     He had requested that his lawyer be contacted and  
12 a plastic surgeon.

13          Q.     Did Mr. Schwartz ask you to contact anybody else  
14 beyond those two?

15          A.     No.

16                   MR. BENSLEY: I have no further questions, Judge.

17                   THE COURT: Any cross examination?

18

19                                   CROSS EXAMINATION

20                   MR. DIEBOLT:

21

22          Q.     Ms. Quattlebaum, when you first came on scene, is  
23 it correct that there was blood coming from the nose and  
24 the left eye orbit of Mr. Schwartz?

25          A.     Yes.

1 Q. And that he was assessed with mild dizziness?

2 A. Correct.

3 Q. Certainly the damage, there was damage to his  
4 facial area; is that fair to say?

5 A. Yes.

6 Q. And that damage wasn't due to him blowing his  
7 nose?

8 A. No, the damage --

9 Q. He had been through some sort of trauma?

10 A. Correct, trauma had already occurred.

11 Q. And you have been in the DOC system long enough  
12 that you could tell he had gotten beat up?

13 A. Yes.

14 Q. And you had indicated by the time he left you or  
15 your unit, both his eyes were swollen shut?

16 A. Correct.

17 Q. And that's why he was transported, because of the  
18 injuries to another medical facility other than your's?

19 A. Correct.

20 Q. That was via ambulance, correct?

21 A. Yes.

22 Q. Did you see the amount of blood that was in the  
23 hallway left behind?

24 A. Yes, I did.

25 Q. Could you determine how much blood was in the

1 hallway?

2 A. It would be an approximation. Most of it was  
3 sphere. He had one area of pooled blood where he was  
4 kneeling which was from the nose bleed.

5 Q. But you don't know how much in volume he lost,  
6 correct? You wouldn't know that answer?

7 A. It would be a moderate estimation.

8 MR. DIEBOLT: Okay. That's fine. That's all I  
9 have, thank you.

10 THE COURT: Redirect, Ms. Bensley.

11

12 REDI RECT EXAMI NATION

13 MR. BENSLEY:

14

15 Q. Would you say from your experience and training  
16 and what you have observed, that injuries to the nose area  
17 bleed alot or bleed more than other injuries?

18 A. Yes they do.

19 MS. BENSLEY: I have nothing further.

20 THE COURT: Questions by any members of the jury?  
21 Thank you, ma'am, you may step down, you are  
22 excused. Defense may call its next witness.

23 MR. KLEIN: Thank you, Your Honor. We call Brad  
24 Roach.

25

1 BRAD ROACH

2 having been duly sworn, takes the witness stand and  
3 testifies as follows.

4

5 DIRECT EXAMINATION

6 MR. KLEIN:

7

8 Q. Good morning. Could you tell the members of the  
9 jury your name.

10 A. My name is Brad Roach. Excuse me, I have got a  
11 bit of a weird voice from a cold. I have got water up  
12 here.

13 Q. Mr. Roach, can you tell the members of the jury  
14 your occupation.

15 A. I'm an attorney here in Tucson.

16 Q. How long have you been an attorney?

17 A. I was admitted to the bar in 1996.

18 Q. And are you in public practice or private  
19 practice now?

20 A. I am in private practice for the last seven  
21 years.

22 Q. Before that where did you work?

23 A. I worked at the Pima County Attorney's Office I  
24 think from '97 to 2005.

25 Q. Let me ask you this first off. Have you ever

1 represented Bradley Schwartz?

2 A. No.

3 Q. Do you know Bradley Schwartz?

4 A. Yes, I do.

5 Q. Could you tell the members of the jury how you  
6 know him?

7 A. I was trying to think of the dates but I knew him  
8 through, he dated a friend of mine for a number of years.  
9 And so I want to say that the incident that he got caught  
10 up with was in October of 2004. So I probably knew him  
11 for about two years before then in 2002 to 2004.

12 Q. And did you socialize with him on occasion?

13 A. Yes. I don't know how many times that we hung  
14 out, he's been to my house at least twice and then we have  
15 probably been to other social occasions a number of times.

16 Q. And in the course of knowing him and over the  
17 last years have you talked with other people concerning  
18 him?

19 A. Yes, many.

20 Q. And as a result of your personal experiences with  
21 Mr. Schwartz, have you developed an opinion about his  
22 character for honesty?

23 A. Yes.

24 Q. And as a result of talking with other people in  
25 the community, have you developed an opinion about his



1 reputation for honesty?

2 A. Yes.

3 Q. And let's stick with that for a second. Could  
4 you tell the members of the jury what your opinion of his  
5 character and his reputation for honesty is?

6 A. My opinion of his ability to be honest is, how  
7 shall I put it, is limited if not, I am not sure he's  
8 capable of being honest.

9 Q. Okay.

10 A. If that makes sense.

11 Q. And in connection with your personal experience  
12 with him, have you developed an opinion about his  
13 character for aggressiveness?

14 A. Yes.

15 Q. And in the course of your conversations with  
16 other people in the community have you --

17 MR. DIEBOLT: I am going to object to this area  
18 of questioning as to aggressiveness, Judge. It is not an  
19 element of anything.

20 THE COURT: Pertinent trait, overruled.

21 MR. KLEIN: Thank you.

22 THE COURT: Counsel, you are going to have to I  
23 think be a little more specific as to physical.

24 MR. KLEIN: I'm sorry?

25 THE COURT: The type of aggressiveness, I think.

1 MR. KLEIN: Oh, okay.

2 Q. Let me backtrack a second. Have you developed an  
3 opinion based on your own personal experiences about his  
4 character for physical aggressiveness?

5 A. Yes.

6 Q. And in the course of your discussions with other  
7 people in the community, have you developed an opinion  
8 about his reputation for physical aggressiveness?

9 A. Yes.

10 Q. What is your opinion about his character and his  
11 reputation for physical aggressiveness?

12 A. Brad Schwartz is not the kind of guy who is going  
13 to go and get in bar fights every weekend. That's not the  
14 kind of aggressiveness he has. If he has the ability to  
15 overcome someone physically because he wants to get  
16 something from them, he will do it. But, so it's a  
17 limited, it is not that he is a fighter, the kind of guy  
18 that just walks around and beats people up. He only uses  
19 aggressiveness to get, as a goal to an end.

20 Q. So when you say as a goal to an end, when you  
21 first described it you said if he wanted to get something  
22 from the other person; is it just limited to that or is it  
23 more general, or is it like you said secondary to a goal?

24 A. If he can get a benefit, basically. That relates  
25 to what I was talking about in regard to honesty. He will

1 tell you his name and date of birth but if he believes  
2 that he can obtain something by being dishonest, he will  
3 do that at the drop of a hat. And the same thing with the  
4 use of physical violence.

5 MR. KLEIN: I don't have any other questions,  
6 Your Honor.

7 THE COURT: Cross examination.

8

9 CROSS EXAMINATION

10 MR. DIEBOLT:

11

12 Q. Mr. Roach, we worked together for a period of  
13 time, correct?

14 A. Yes.

15 Q. And for a period of time you had a bright career  
16 at the Pima County Attorney's Office, correct?

17 A. I thought so.

18 Q. Short but brilliant?

19 A. I liked the job.

20 Q. And you didn't leave the job because you, let me  
21 rephrase that. You left that position?

22 A. Yes.

23 Q. Not because you wanted to?

24 A. No, I quit.

25 Q. Can you explain that?

1       A.     But I agree, I didn't want to quit.

2       Q.     You didn't want to quit but you did quit?

3       A.     Yes.

4       Q.     But prior to quitting, there was a little period  
5 of time where you were asked to leave?

6       A.     There was a time, I was served with, the way the  
7 County Attorney's Office worked, like alot of public  
8 agencies if you want to fire somebody who works there, you  
9 have got to follow certain procedures. So I was served  
10 with a notice of intent to terminate by Barbara LaWall  
11 right after November, December of 2004.

12      Q.     There was a whole process involved and there was  
13 time, energy, stress, money involved and ultimately  
14 everything settled down somewhat?

15      A.     Yes, it was long and arduous and then it settled  
16 down eventually.

17      Q.     Kind of a mess for you and others?

18      A.     Very personally a mess for me.

19      Q.     And as you sit here today you haven't changed  
20 your mind that the cause of that mess was Bradley  
21 Schwartz? In part, in great part?

22      A.     If Schwartz hadn't done what he had done, none of  
23 that would have occurred, I agree.

24      Q.     So in essence to tie them together, he was a  
25 large part of you not working as a prosecutor at the Pima

1 County Attorney's Office?

2 A. I don't mean to be --

3 Q. Technical?

4 A. To wiggle but if he hadn't done what he did, none  
5 of that would have happened. But the problem I had with  
6 the County Attorney's Office was with Barbara LaWall. So.

7 Q. The elected official?

8 A. Correct.

9 Q. But that problem was based on all that mess?

10 A. Yes, exactly.

11 Q. And that mess was Brad Schwartz?

12 A. Was caused by Brad Schwartz, absolutely.

13 Q. And the opinion that you are rendering right now  
14 is from 2003 and 2004, I mean this dating wasn't for  
15 years, it was for maybe less than a two year period,  
16 right?

17 A. I think. I would guess less than two years.  
18 It's been a long time.

19 Q. So you are talking about your opinions from 2003,  
20 2004 or a little bit before 2003/2004?

21 A. And then during the whole incident that occurred  
22 with him and then there was a trial and there was alot of  
23 publicity, I was approached by people after that but so  
24 we're talking 2005. But since probably --

25 Q. Well, you haven't had any direct contact or

1    communications?

2            A.    No.    I have not seen Brad Schwartz since well  
3    before November of 2004.

4            Q.    I think you said earlier that he's not a fighter,  
5    like he's not going to walk up to someone and start  
6    punching someone?

7            A.    No.

8            Q.    He's a little doctor?

9            A.    Yeah, absolutely, he would not, I can't imagine  
10    under any circumstances him getting into a bar fight and  
11    puffing out his chest like you see guys do. That's not  
12    the kind of thing he would do, at least I don't think so.

13          Q.    Certainly around that time that we are talking  
14    about back around 2003/2004, you were aware that he was  
15    getting prescriptions for oxycodone and taking those like  
16    candy?

17          A.    Yes, that's true.

18                   MR. DIEBOLT: Thank you, that's all I have.

19                   THE COURT: Any redirect?

20                   MR. KLEIN: Yes.

21

22                                   REDIRECT EXAMINATION

23                   MR. KLEIN:

24

25          Q.    Mr. Roach, is your opinion concerning

1 Mr. Schwartz's character for an incapacity to tell the  
2 truth the result of anger because you quit the County  
3 Attorney's Office?

4 A. No. I mean I definitely do not like him and you  
5 could say I have anger with him sometime or another, but  
6 the kind of things that, I had problems with the guy way  
7 before the thing that got in the newspaper and caused all  
8 these problems, because of the way he treated my friend  
9 that he was dating and other things.

10 So I had had long talks with her way before this  
11 happened about, hey, look, this is not a person that you  
12 want, you know, I had had this opinion before any of that  
13 happened and then the final event was just kind of proof.

14 Q. And is the same true regarding your opinion  
15 concerning his character and reputation for physical  
16 aggressiveness? In other words, it's --

17 A. It's not caused by my anger towards him, is that  
18 the question?

19 Q. Yes?

20 A. No. I mean given what he eventually had problems  
21 with, and then the way he treated my friend that he was  
22 dating, a female, that's where I come up or that's where I  
23 developed my opinion.

24 Q. Do you like what you are doing now?

25 A. You know, I was a prosecutor and I really, really

1 I liked it. And then I didn't expect to become a defense  
2 attorney and like it that much, but I actually do.

3 Q. So he's not pushed, his behavior and your  
4 quitting the County Attorney's Office hasn't pushed you  
5 into the depths of depression in your employment?

6 A. No. I mean everything happens for a reason. The  
7 world works and bad things may occur and then you look at  
8 it later and you go, hey, that was something that changed  
9 my life and I actually like where I am right now alot, so.

10 MR. KLEIN: I don't have any other questions.

11 THE COURT: Jury have any questions of this  
12 witness? Thank you, Mr. Roach, you may step down, you are  
13 excused.

14 THE WITNESS: Thank you, Your Honor.

15 THE COURT: The defense may call its next witness.

16 MR. KLEIN: Thank you , Your Honor. We call Sian  
17 Rayot.

18

19 OFFICER SIAN RAYOT

20 having been duly sworn, takes the witness stand and  
21 testifies as follows.

22

23 DIRECT EXAMINATION

24 MR. KLEIN:

25



1 Q. Good morning, Ms. Rayot, would you please tell  
2 the members of the jury your name.

3 A. Sure. My name is Sian Rayot.

4 Q. And are you employed?

5 A. Yes, I am.

6 Q. Where do you work?

7 A. For the Department of Corrections, Arizona  
8 Department of Corrections.

9 Q. How long have you worked for the Department of  
10 Corrections?

11 A. For about three and a half years, almost four  
12 years.

13 Q. And are you assigned to a particular facility  
14 within the Department of Corrections?

15 A. Yes, the Tucson complex.

16 Q. And were you working there back on September  
17 27th, 2008?

18 A. Yes, I was.

19 Q. And what type of work did you do for the  
20 Department of Corrections back on September 27th, 2008?

21 A. I'm a corrections officer and I was then too.

22 Q. Were you assigned on that day to a particular  
23 unit as a corrections officer?

24 A. Yes.

25 Q. What unit was that?

1 A. Rincon.

2 Q. And did you have particular duties on September  
3 27th of 2008?

4 A. Just our regular duties that we normally do every  
5 day.

6 Q. On September 27th, 2008, did you come in contact  
7 with an inmate by the name of Bradley Schwartz?

8 A. Yes, I did.

9 Q. Can you tell the members of the jury how you came  
10 into contact with him?

11 A. Sure. There was a situation that happened which  
12 we call an I. C. S. Basically when that goes off we have  
13 to get to where the area is at and at that time that's  
14 when I saw Mr. Schwartz.

15 Q. Okay. And did you have any interactions with  
16 him?

17 A. Not at that time.

18 Q. At some point later did you?

19 A. Yes.

20 Q. What did you do with Mr. Schwartz later on?

21 A. I was one of the transport officers.

22 Q. And can you tell the members of the jury what a  
23 transport officer is?

24 A. Sure. When an inmate is injured, what we do is,  
25 if the medical staff at the complex tells us that we have

1 to take them to the hospital, then we are the transport  
2 officers that take him to the hospital to insure his  
3 safety and the public's safety.

4 Q. Now when he was taken to the hospital, which  
5 hospital did he go to?

6 A. We went to Saint Mary's.

7 Q. Did you go in a Department of Corrections'  
8 vehicle or some other vehicle?

9 A. I was in the ambulance with him.

10 Q. Okay. And while you were in the ambulance with  
11 him, can you tell the members of the jury how he appeared  
12 to you mentally?

13 A. He was not all there. He was not very coherent.  
14 You could tell he was in a lot of pain.

15 Q. And did he appear to you when he was in the  
16 ambulance to understand why he was even in an ambulance?

17 A. At that time, no, he didn't understand why he was  
18 in an ambulance.

19 Q. Did you eventually go to Saint Mary's Hospital?

20 A. Yes.

21 Q. And did you follow him around while he was in  
22 Saint Mary's Hospital?

23 A. Yes, we have to be with him at all times.

24 Q. So did you hear him interact with doctors at  
25 Saint Mary's Hospital?

1           A.     Yes, I did.

2           Q.     Can you tell the members of the jury how he  
3 interacted with the doctors?

4           A.     Basically he was, his interactions were stating  
5 that, he was kind of self diagnosing himself and he was  
6 telling them that he was in pain, kind of telling them  
7 what he thought needed to be done to him, what kind of  
8 medications and things like that.

9           Q.     He was giving doctors directions about what to  
10 do?

11          A.     Yes.

12          Q.     Did that seem different in terms of his mental  
13 state from the way he was behaving and the way he was in  
14 the ambulance?

15          A.     A little bit. I mean he was a little more lucid  
16 at that point, more concerned with himself.

17          Q.     And at some point did he wind up going to  
18 Maricopa County Medical Center?

19          A.     Yes, he did.

20          Q.     How did he get there?

21          A.     By helicopter.

22          Q.     Did you go with him?

23          A.     Yes, I was on the helicopter that transported  
24 him.

25          Q.     And was there another officer involved with you

1 in the transportation up to Maricopa County?

2 A. Yes, there was.

3 Q. Who was that?

4 A. Officer Chiaravallio.

5 Q. And can you explain to the members of the jury  
6 how Officer Chiaravallio was involved?

7 A. Sure. When we have to transport inmates to the  
8 hospital, there are usually two officers that go. Only  
9 one can ride in the helicopter, so Officer Chiaravallio had  
10 to follow in a state transport vehicle up to Maricopa  
11 County then to pick me up. Or he followed us up,  
12 basically.

13 Q. And did you remain with Mr. Schwartz during the  
14 preliminary stages of his time at Maricopa County Medical  
15 Center?

16 A. Yes.

17 Q. Did he continue to give instructions to medical  
18 personnel up there?

19 A. Yes, he did.

20 Q. Do you know why Mr. Schwartz was transported from  
21 Saint Mary's Hospital to Maricopa County?

22 A. He was transported, the reason I was told he was  
23 transported --

24 MR. DIEBOLT: Objection.

25 THE COURT: Sustained.

1 MR. KLEIN:

2 Q. Do you know of your own personal knowledge?

3 A. Only from what I heard from the doctors and the  
4 security that was at the hospital.

5 Q. Okay. Now was this the first encounter that you  
6 had ever had with Mr. Schwartz?

7 A. No, I had had previous contact.

8 Q. In fact did you have a conversation with  
9 Mr. Schwartz roughly a week or so before September 27th?

10 A. Yes, I did.

11 Q. Do you remember what that contact with Mr.  
12 Schwartz was about?

13 A. Yes, I do.

14 Q. Could you tell the members of the jury what it  
15 was about?

16 A. Sure. There was another officer and myself that  
17 had not necessarily a meeting but we asked Mr. Schwartz to  
18 come in to talk to us. He was saying basically that he  
19 didn't want to do what we call PC, which is protective  
20 custody off of a yard, he felt that he didn't need that,  
21 that he didn't want that at all. And we were kind of  
22 encouraging him to go that route because he was  
23 complaining he was having people threatening him,  
24 basically.

25 Q. But, so you were trying to encourage him to do

1 that and he was saying he didn't want to do that?

2 A. Exactly.

3 Q. Did he make some comment to you about the  
4 responsibility of the Department of Corrections?

5 A. Yes, he felt that it was our responsibility to  
6 protect all inmates no matter what.

7 MR. KLEIN: Okay, I don't have any other  
8 questions.

9 THE COURT: Cross examination.

10

11 CROSS EXAMINATION

12 MR. DIEBOLT:

13

14 Q. Officer, what is protective custody, how is that  
15 different from general population?

16 A. Well, if they are being threatened by other  
17 inmates, alot of times they will come to an officer or  
18 some staff.

19 Q. I mean what is it, if I want to go into  
20 protective custody where do you take me?

21 A. Oh, we take you basically to a lock-down unit  
22 where you are in a cell by yourself where you are not  
23 really going to have contact with very many other inmates.

24 Q. So you have no contact with anyone else other  
25 than corrections officers?

1       A.     That's correct.

2       Q.     You are in a lock-down situation?

3       A.     Yes.

4       Q.     You don't have access to the yard?

5       A.     Exactly.

6       Q.     How long do you get out?

7       A.     Really one hour a day maybe.

8       Q.     I mean DOC is restrictive but lock-down, PC is  
9 really restrictive?

10      A.     Exactly, very restrictive.

11      Q.     Not fun?

12      A.     Not at all.

13      Q.     Not fun to be in prison in the first place but if  
14 you do PC you are in a little box?

15      A.     Exactly.

16      Q.     But Schwartz did tell you he did didn't want to  
17 go back on the yard?

18      A.     Well, he was, he didn't necessarily say that he  
19 didn't want to go on the yard, he just felt that he  
20 shouldn't have to -- I'm sorry.

21      Q.     The regular yard I'm talking about?

22      A.     Yes, he didn't want to go on the regular yard at  
23 all, on the GP yard, yes.

24      Q.     And when he said that, he said he was afraid for  
25 his life, that he would be beaten up, that's why he didn't



1 want to go to the regular yard?

2 A. That's correct.

3 MR. DIEBOLT: I think that's all I have, thank  
4 you very much.

5 THE COURT: Redirect.

6

7 REDI RECT EXAMI NATION

8 MR. KLEIN:

9

10 Q. Officer Rayot, if Mr. Schwartz was on unit six or  
11 housing unit six in the Rincon unit back in September of  
12 2008, was that considered general population or was it a  
13 hybrid?

14 A. It actually wasn't considered general population  
15 at that time.

16 Q. Can you explain to the jury why not?

17 A. It was considered kind of a protective custody  
18 house type situation. Where we didn't have these guys  
19 necessarily mingle with the general population.

20 Q. Okay. So it wasn't a situation where, I should  
21 say it wasn't a situation where he was only able to get  
22 access for an hour a day if he was in unit six?

23 A. Exactly, in that house he had more time to be out  
24 of a cell.

25 MR. KLEIN: Thank you, I don't have any other

1 questions.

2 THE COURT: Does the jury have any questions of  
3 this witness?

4 Thank you, ma'am, you may step down, you are  
5 excused. Defense may call its next witness.

6 MR. KLEIN: Judge, I apologize, our next witness  
7 was subpoenaed to come in at 1:30 today.

8 THE COURT: Very well. Then Ladies and  
9 Gentlemen, I guess what we will do is we will break early  
10 for lunch to accommodate the witness's schedule. So I ask  
11 you to return to the courthouse at 1:25. And during the  
12 recess remember not to discuss the case with each other or  
13 with anyone else. Keep an open mind. And will that be  
14 your last witness?

15 MR. KLEIN: Yes, Judge.

16 THE COURT: So as you can tell, the case will go  
17 to you this afternoon. So we are well on schedule. So we  
18 will see you back at 1:25.

19 The record will show the absence of the jury, the  
20 presence of counsel and the defendant.

21 Counsel, I think we should take this time to  
22 address the jury instructions. I know you just had them  
23 handed to you this morning, the latest version of the  
24 Court's final instructions. They are the same as  
25 originally distributed except for the addition to

1 instruction ten, which more or less reflects the defense  
2 of self defense.

3           So otherwise they are, they don't differ from  
4 what you had before. And as soon as you have had an  
5 opportunity to check them out, I will ask the defense to  
6 make whatever record you would like to make.

7           MR. KLEIN: Thank you, Judge. Judge, I have had  
8 a chance to review them. And in connection with Court's  
9 instruction number one, the only objection that I have to  
10 it is that it does not make any reference to the jury  
11 being able to consider reasonable inferences that may be  
12 drawn from the evidence.

13           So what I would be requesting is that in the  
14 second sentence in the second paragraph, that it be  
15 modified to say, when I say evidence, I mean the testimony  
16 of witnesses and the exhibits that have been introduced  
17 during the trial, as well as reasonable inferences that  
18 may be drawn from the testimony and exhibits.

19           THE COURT: The Court declines to make that  
20 modification, you can certainly argue that but the Court's  
21 giving one as it is written.

22           MR. KLEIN: If I may respond, Your Honor. As the  
23 Court well knows, if I make that argument and it's not in  
24 the instructions, the essence of the instructions is that  
25 they're not to consider my argument.

1           I object to number two. Number one, I would  
2 request in lieu of that that the Court give defense number  
3 one which is the standard RAJI instruction. The  
4 difficulty that I have with Court's instruction number two  
5 is that I believe that it unduly restricts how the jury  
6 may consider closing argument and opening statements as  
7 well. Obviously, in particular, for example when it says  
8 that verdicts should be based not upon the lawyers'  
9 statements but upon the evidence; number one, it suggests  
10 that there may be a dichotomy between those two.

11           And certainly a jury particularly, in light of  
12 the Court's ruling as to instruction number one, if I am  
13 making closing arguments and I ask the jury to draw  
14 reasonable inferences and if they agree with those  
15 reasonable inferences, this instruction basically says  
16 they may not consider those reasonable inferences and they  
17 may not base their verdict on those reasonable inferences.

18           And I believe that the Court's instruction  
19 undermines the role of counsel in discussing the evidence  
20 and arguing reasonable inferences and is contrary to the  
21 decision of the Arizona Supreme Court in State versus West  
22 176 432, State versus Daniel 136 Arizona 188; and State  
23 versus Dumaine 162 Arizona 392.

24           THE COURT: I will wait for the Court of Appeals  
25 to tell me that there is something wrong with that

1 instruction, I will give two as it reads, and they have  
2 told me that in the past as you well know.

3 MR. KLEIN: And as the Court knows, I am  
4 objecting to the Court's instruction number three, the  
5 Portillo instruction. In lieu of that I would ask the  
6 Court to give defense instruction 10.

7 My objection to Portillo is three fold; basically  
8 all three arguments relate to the fact that Portillo  
9 reduces the burden of proof of the State in violation of  
10 due process and the 14th amendment to the United States  
11 constitution and Article two Section four of the Arizona  
12 constitution.

13 The first way is it states, it refers to the  
14 civil cases and in so doing makes it sound like basically  
15 preponderance of the evidence is the same as clear and  
16 convincing evidence. It then says that proof beyond a  
17 reasonable doubt is more than that. And in so doing it  
18 reduces proof beyond a reasonable doubt to something much  
19 closer to clear and convincing evidence.

20 Secondly, it equates proof beyond a reasonable  
21 doubt with being firmly convinced. Historically, many,  
22 many years ago firmly convinced was the language used to  
23 define clear and convincing evidence.

24 And then finally in the last paragraph it says if  
25 you think that there is a real possibility that the

1 defendant is not guilty, then you should find him not  
2 guilty. The Supreme Court has been trying to make jury  
3 instructions less legalese and more comprehensible to  
4 ordinary individuals who serve on a jury, but when they  
5 say a real possibility, the ordinary juror is going to  
6 understand that to mean it is very possible. By saying  
7 that we have to show that it is very possible, they are  
8 reducing the State's burden of proof.

9 THE COURT: I think instruction three reflects  
10 the current status of the case law in Arizona and the  
11 Court will give number three over objection.

12 MR. KLEIN: Number five, I have submitted our  
13 instruction number 11 and the advantage that I think our  
14 instruction has is that it does not have the language of  
15 the next to the last sentence of the Court's instruction.  
16 The jurors may well not have even thought that simply  
17 because Mr. Wood has not testified he might be guilty, but  
18 when the Court's instruction makes that reference, I  
19 believe that that could very easily put that thought into  
20 the juror's mind.

21 THE COURT: So it's the last sentence, tell me  
22 how you would modify it?

23 MR. KLEIN: Basically to take out the next to the  
24 last sentence, you must not conclude that the defendant is  
25 likely to be guilty because of his choices on these

1 matters.

2 THE COURT: You would like that removed?

3 MR. KLEIN: Yes.

4 THE COURT: All right, the Court will do so.

5 MR. KLEIN: I object to instruction number eight.  
6 I don't object to the first paragraph. The second  
7 paragraph, however, is the only culpable mental state in  
8 which the Court says that it may be inferred, basically  
9 from circumstantial evidence, and by doing so, number one,  
10 it wrongfully suggests to the jury that that only applies  
11 to intent.

12 And number two, it doesn't apply to the other  
13 culpable mental state. So I believe that that paragraph  
14 should be deleted.

15 THE COURT: The whole second paragraph?

16 MR. KLEIN: Yes.

17 THE COURT: Okay. Any objection to that, Mr.  
18 Diebolt?

19 MR. DIEBOLT: He wants to take it out?

20 THE COURT: He wants paragraph two out of number  
21 eight.

22 MR. DIEBOLT: I think that is helpful to the jury  
23 to make a decision, Judge.

24 THE COURT: Well, I do, too. I think all of what  
25 I proposed is helpful to the jury but counsel disagrees.

1           MR. DIEBOLT: It is up to you, Judge, but  
2 obviously you need to define intent and that is a portion  
3 of the definition of intent. There is an intentional  
4 infliction of injury and that's why it is important.

5           THE COURT: I am going to leave it as it is.

6           MR. KLEIN: I object to 10 B. Number one,  
7 there's a typographical error in the first spelling of the  
8 defendant. But more importantly, I don't think it's a  
9 correct statement of the law. I believe that the law  
10 simply is if we present enough evidence to meet the  
11 requirement to justify a jury instruction, then the  
12 State's burden is to prove no self defense beyond a  
13 reasonable doubt. This instruction puts the burden on us  
14 of showing by a preponderance of the evidence.

15           MR. DIEBOLT: Judge, could we argue that whole  
16 self defense ruling quickly?

17           THE COURT: Yes.

18           MR. DIEBOLT: Are you even giving an instruction?  
19 There has to be some evidence and there's absolutely zero  
20 evidence of a self defense. Zero. Now there is evidence  
21 to the contrary. There is nothing, not a word supporting  
22 that.

23           THE COURT: Well, that's why we tell the jury  
24 though, isn't it, that if the defense presents evidence,  
25 if they have presented evidence and I think a



1 preponderance of the evidence is required by the statute.

2 MR. DIEBOLT: It is only required if there is  
3 evidence to support self defense, then the burden shifting  
4 kicks in. I don't care about the burden shifting, the  
5 State proving that it is not self defense, but there has  
6 to be something. You just don't, otherwise we would give  
7 self defense in every aggravated assault and we don't, we  
8 simply don't. There has to be something.

9 As a general rule I'm okay with self defense  
10 instructions if there's something to support it. There is  
11 nothing. So my position is I don't think it should even  
12 be given; therefore we shouldn't be talking about the  
13 nuances of it.

14 THE COURT: All right, I understand your  
15 position. Mr. Klein, how do you respond to the fact that  
16 there is no factual basis in the evidence at this point to  
17 warrant the giving of a self defense instruction?

18 MR. KLEIN: Well, there is sufficient evidence to  
19 warrant giving the instruction; number one, we have the  
20 testimony of Mr. Roach that Mr. Schwartz is aggressive  
21 when it is to his benefit. We know that he has filed a  
22 lawsuit. We know that immediately upon being treated by  
23 the nurse he asked to have his lawyer contacted.

24 We also know that Mr. Wood said, I didn't mean to  
25 hurt him. Well, why do you hit somebody if you don't mean

1 to hurt them? An inference that could be drawn from that  
2 is that he hit him because he was responding to, he was  
3 acting in self defense.

4 I mean you either hit somebody because you want  
5 to hurt them; or you hit somebody because you are  
6 protecting yourself. So when he says he didn't mean to  
7 hurt him, that is evidence that he was acting in self  
8 defense.

9 Plus the description that Mr. Schwartz gives of  
10 what happened does not match the physical evidence. It  
11 could not have happened the way he said it happened.

12 THE COURT: That may be but I don't recall any  
13 evidence at all indicating any act by the victim that  
14 would require reaction by the defendant.

15 MR. KLEIN: Well, and that's why I say that the  
16 circumstantial evidence is the basis for our request for a  
17 self defense instruction.

18 THE COURT: And that would be the circumstantial  
19 evidence that you just enumerated?

20 MR. KLEIN: Yes, among other things, those are  
21 the major things.

22 THE COURT: But none of that has to do with the  
23 actual incident itself, those are not facts in evidence  
24 that relate to the actual occurrence. Those are  
25 circumstantial things around what might have been the

1 victim's motivation for perhaps exaggerating his condition  
2 or I don't know what else. But --

3 MR. KLEIN: Well, I have to disagree with the  
4 Court. When Mr. Wood says I didn't intend to hurt him,  
5 that relates specifically to the way in which the incident  
6 occurred. When Mr. Roach says --

7 THE COURT: I don't think so, counsel. I don't  
8 see how you get to that relates to self defense when he  
9 says in essence when I hit him I didn't mean to hurt him.  
10 That doesn't mean he was defending himself. That just  
11 means perhaps he intended to do less damage than he did.

12 MR. KLEIN: It means, it says I didn't mean to  
13 hurt him; it means I didn't mean to do any damage.

14 THE COURT: How is that self defense?

15 MR. KLEIN: Because why else, like I said, I  
16 think really the only two explanations for hitting  
17 somebody, and certainly if the Court or Mr. Diebolt can  
18 think of other explanations, that's fine, but you hit  
19 somebody to either hurt him or you hit somebody to protect  
20 yourself. Mr. Wood said, I didn't intend to hurt him.  
21 Not, I didn't intend to hurt him so much. But I didn't  
22 intend to hurt him.

23 That then only leaves, I was responding to  
24 protect myself.

25 THE COURT: Well, I guess it could be I intended

1 to send a message. I intended to insult him, it could be  
2 alot of other reasons besides self defense. I mean there  
3 is no evidence out of his mouth or anyone else's that  
4 there was any thought in his mind that he needed to  
5 protect himself.

6 MR. KLEIN: Well, when you say it could be  
7 evidence that he intended to insult him, et cetera, you  
8 are drawing an inference as to why he hit him. Based on  
9 his statement and the information. When you draw that  
10 inference, another inference that can be drawn is in fact  
11 that he acted to protect himself.

12 THE COURT: Neither of those are inferences;  
13 those are both pure speculation based on this record.

14 MR. KLEIN: I am not sure what you mean by  
15 neither, are you saying that the Court's statement that he  
16 --

17 THE COURT: My statements about the possible  
18 motive and your statements as to the motive are both pure  
19 speculation.

20 MR. KLEIN: I disagree because you have to put  
21 them in the context of what Mr. Roach had to say and you  
22 also have to put them in the context of the physical  
23 impossibility of what Mr. Schwartz had to say and in the  
24 context of his motive to show that the Department of  
25 Corrections wasn't providing him with adequate protection.

1           THE COURT: I don't see the connection between  
2 any of those things and I think that Mr. Diebolt is right,  
3 I don't think there's really a factual basis that would  
4 warrant giving the instructions on the defense of self  
5 defense. Given the record that we have in this case at  
6 this point. So the Court will not give a self defense  
7 instruction.

8           MR. KLEIN: As to Court's instruction number 11,  
9 I think the Court was drawing an inference from the  
10 allegation of aggravated assault that there must have been  
11 an allegation of dangerous nature, but there is not one so  
12 I would ask the Court to remove that.

13          THE COURT: I thought that the State had alleged  
14 that but I may be mistaken.

15          MR. DIEBOLT: We have alleged a prior conviction  
16 being one of a dangerous nature, that may have been the  
17 source.

18          THE COURT: Okay. So you don't object either to  
19 the removal of 11?

20          MR. DIEBOLT: Yes, I don't think it is necessary,  
21 Judge.

22          THE COURT: And by the same token we don't need  
23 that to be reflected in the form of verdict.

24          MR. DIEBOLT: Correct. I think it only can be  
25 dangerous if there is serious physical injury.

1 THE COURT: Number 11 is removed then. Okay.

2 Mr. Klein, I'm sorry, go ahead.

3 MR. KLEIN: Your Honor, I object to the Court's  
4 instruction number 15 and ask that in lieu of that, that  
5 the RAJI instruction on direct and circumstantial evidence  
6 be given. For example, in paragraph number two the Court  
7 basically is saying on circumstantial evidence you must  
8 consider whether it's been, you must consider it in light  
9 of reason, experience and common sense. That's true.

10 But there's no basis for highlighting that,  
11 particularly as to circumstantial evidence. That's true  
12 of all evidence and the Court gives that instruction in  
13 the general assessment of credibility of witnesses. But  
14 to then highlight it as to circumstantial evidence I think  
15 is improper and so I would ask that the Court give the  
16 RAJI on circumstantial evidence.

17 THE COURT: Well, so you want me to add, before  
18 you decide a fact has been proved by circumstantial  
19 evidence or any other evidence, you must consider all of  
20 these.

21 MR. KLEIN: Well, I think the Court could  
22 certainly do that. I don't think there is a need to do  
23 that when the Court has already included in its  
24 credibility of witnesses that you assess credibility based  
25 on all the other evidence in the case.

1           THE COURT: So what it is that you want is to  
2 remove the last sentence of the second paragraph?

3           MR. KLEIN: That would take care of my specific  
4 objection. I think the easiest thing is to just give the  
5 RAJI. Because it basically says there are two types of  
6 evidence, direct and circumstantial, the law makes no  
7 distinction between them, it just requires that you be  
8 convinced beyond a reasonable doubt before finding the  
9 defendant guilty.

10          THE COURT: What is your number, Mr. Klein?

11          MR. KLEIN: I actually don't have it in my packet  
12 but I know that there is a RAJI for circumstantial  
13 evidence. I can provide it for the Court over the lunch  
14 hour.

15          THE COURT: Well, I will give it as it is.

16          MR. KLEIN: And my last objection is to  
17 instruction number 18 and I would request the Court add a  
18 sentence to that, to clarify that even though exhibits may  
19 not have been admitted into evidence, when there is  
20 testimony about those exhibits the jury can consider the  
21 testimony about the exhibits.

22                 And what I would propose is that the Court  
23 instruct the jury in addition to its 18 and say, however  
24 if testimony was introduced regarding what an exhibit said  
25 or showed, you may consider that testimony even though the

1 exhibit itself was not admitted. I believe that's an  
2 accurate statement of the law.

3 THE COURT: Did you submit such an instruction  
4 for that?

5 MR. KLEIN: Beg your pardon?

6 THE COURT: Is that a submitted defense  
7 instruction somewhere in your packet?

8 MR. KLEIN: No, it is not and again I can write  
9 it up and present it to the Court over the lunch hour.

10 THE COURT: Okay. Mr. Diebolt, do you have  
11 anything to say about 18?

12 MR. DIEBOLT: It seems like it complicates it  
13 more, Judge, but whatever you want to do, I am fine with.  
14 We have already told them to consider testimony so now  
15 we're telling them again to consider testimony.

16 THE COURT: I am going to give 18 as it is  
17 written. Anything else, Mr. Klein?

18 MR. KLEIN: No, Your Honor.

19 THE COURT: Mr. Diebolt, do you have any record  
20 you want to make as to the instructions?

21 MR. DIEBOLT: No, Judge, thank you.

22 THE COURT: How about as to the form of verdict?  
23 I am not sure you have that.

24 MR. DIEBOLT: No.

25 THE COURT: Let me show it to you. I have



1 removed the dangerous nature interrogatory or will have it  
2 removed.

3 MR. KLEIN: With the dangerous nature removed I  
4 don't have any objection.

5 THE COURT: All right. Thank you. Very well  
6 then, the Court will be in recess until 1:25.

7 MR. KLEIN: At some point I would like to make a  
8 Rule 20 motion.

9 THE COURT: You can do it now then.

10 MR. KLEIN: Two points, Your Honor. Number one,  
11 and I don't know if this is minor but I don't believe that  
12 there was any witness who testified that this all occurred  
13 in Pima County.

14 Number two, I think what the testimony shows is  
15 not temporary but substantial disfigurement but permanent  
16 injury. It is like going to trial on a charge of  
17 residential burglary and the evidence showing that it is a  
18 non-residential structure.

19 So for those reasons I would ask that the Court  
20 enter judgment of acquittal. And certainly the State is  
21 not surprised by the nature of Mr. Schwartz's injuries.  
22 They have known about that since the filing of this case.  
23 It is improperly charged and therefore the case should be  
24 dismissed.

25 THE COURT: Mr. Diebolt.

1           MR. DIEBOLT: Judge, I think he's asking for it  
2 to be a serious physical injury case which makes it a  
3 class three which I am fine with. Move it from a four to  
4 a three pursuant to 13.5 B. I move to amend to conform to  
5 the testimony at trial.

6           THE COURT: Well, it seems to me that as to the  
7 first part of the argument there was testimony that this  
8 was the Tucson unit of the Department of Corrections, so I  
9 think that has been satisfied, the jurisdiction of Pima  
10 County.

11           As to the second, the aggravated assault  
12 instruction indicates that the assault must be aggravated  
13 by several different things and the last one is, or a  
14 fracture of any body part. We have fractures of the  
15 facial bones so it seems to me that that satisfies the  
16 requirements of that particular offense.

17           So the Rule 20 motion is denied.

18           Anything else, counsel?

19           MR. KLEIN: No, Your Honor.

20           THE COURT: The Court will be in recess until  
21 1:30 then.

22

23           ((Whereupon the noon recess is taken and the  
24 trial resumes as follows.))

25

1           THE COURT: The record will show the absence of  
2 the jury, the presence of counsel and the defendant. Is  
3 there anything we need to take up before we bring the jury  
4 back?

5           MR. KLEIN: Yes, Your Honor, two matters. One  
6 relating to the instructions. I had indicated to the  
7 Court that I would provide both the RAJI on circumstantial  
8 evidence and my requested modification of Court's number  
9 18. And I am providing them to the clerk, those two  
10 instructions.

11           In addition I neglected to formally in terms of  
12 making the record request that the Court give defendant's  
13 instruction number two, which is the Willits instruction.  
14 Particularly now with the ruling of the Court, that  
15 instruction is even more important and it is clear that we  
16 do have evidence that either was lost or failed to be  
17 preserved or was destroyed. And so I think it is  
18 appropriate for the Court to give that instruction, that's  
19 our number two.

20           THE COURT: All right. Mr. Diebolt, with regard  
21 to Willits?

22           MR. DIEBOLT: Judge, there are actually three  
23 prongs. I agree that the State, being the Department of  
24 Corrections, had access to the pants and shoes. And for  
25 whatever reason they are missing.

1           But the second two parts are, tend to exonerate  
2 the defendant. In light of the totality of the  
3 circumstances, the evidence that we are talking about,  
4 there is no tendency to exonerate. None whatsoever. He  
5 makes admissions that he did it. And even if he wouldn't  
6 care whose blood is on there, he had no apparent injuries  
7 and the missing evidence has to result in prejudice to the  
8 defendant.

9           While they have established prong one, they  
10 failed on prongs two and three, Judge, so there is no  
11 basis for a Willits instruction.

12           THE COURT: Well, the Court agrees with the  
13 State, especially with regard to the third prong,  
14 resulting in prejudice, given the admission that the  
15 assault occurred, so the Court will not give the Willits  
16 instruction.

17           MR. KLEIN: The other matter relates to a  
18 question that was asked by the jurors as to why  
19 Mr. Schwartz was transported from Saint Mary's Hospital to  
20 Maricopa County. What I would propose, since this came up  
21 and we can't subpoena the doctor from Saint Mary's  
22 Hospital, Mr. Diebolt had marked as State's exhibit number  
23 13 records from Saint Mary's Hospital. There is a 14 page  
24 report entitled emergency documentation, and contained in  
25 that report is the explanation as to why he was

1 transported up to Maricopa County Hospital. It's only  
2 basically on one page, I would be happy to just admit the  
3 one page but I think that might unduly highlight it. I  
4 certainly believe that it would be appropriate to submit  
5 to the jury the entire 14 page emergency documentation to  
6 answer that question.

7 THE COURT: What is the gist of it, Mr. Klein?

8 MR. KLEIN: The gist of it is that there is a Dr.  
9 Emami who was advised that Mr. Schwartz was a patient and  
10 he refused to treat Mr. Schwartz because he had previously  
11 been threatened by him.

12 THE COURT: What happened to the Hippocratic  
13 oath?

14 MR. KLEIN: I can't say, Your Honor.

15 THE COURT: But does it indicate that that's the  
16 only reason or was that just one of the reasons?

17 MR. KLEIN: It indicates I think that that is  
18 basically one of the reasons. There is a choice that was  
19 basically having him go to University Medical Center and  
20 University Medical Center said they would rather have him  
21 go to Maricopa County.

22 THE COURT: Well, I guess the essence of your  
23 concern is, I have to guess here a little bit, that that  
24 would be an indication you think unfairly that it was a  
25 result of the seriousness of the injuries?

1           MR. KLEIN: Well, I think that was the testimony.  
2 And if I remember right I believe it was Investigator  
3 Friedlander where that became an issue. And I can show  
4 the Court, it's page three of the 14 page emergency  
5 documentation. And the part that's particularly relevant  
6 is the top third paragraph, I was informed that Dr. Emami,  
7 and so on.

8           THE COURT: I think the most appropriate way to  
9 address this, if we address it at all, is simply through a  
10 stipulation that says that among the reasons that the  
11 victim was transported to the Maricopa Medical Center was  
12 the lack of physicians at Saint Mary's Hospital to treat  
13 the defendant. Because in essence that's what it is.

14           If you go beyond that, it gets into 403 problems.  
15 So it depends on how serious you think the current status  
16 of the evidence is. Or how much prejudice there is to  
17 your client.

18           MR. KLEIN: I don't know what Mr. Diebolt's  
19 position is regarding a stipulation.

20           THE COURT: Mr. Diebolt.

21           MR. DIEBOLT: Judge, I am not willing to  
22 stipulate, I think it confuses. It doesn't address the  
23 issue. There is no particular issue. It certainly could  
24 be contractual issues with DOC. At UMC we have a level  
25 one trauma unit, why wasn't he brought there, I mean it

1 brings all kinds of stuff in and to focus on one part of  
2 it I don't think makes any sense, Judge.

3 THE COURT: Well, it seems to me, and I don't  
4 remember exactly but it seems to me that the defense in  
5 its examination of witnesses brought out the fact that  
6 there was an issue with doctors at Saint Mary's, I think I  
7 probably sustained an objection at some point. But it  
8 seems like that information was brought out on either  
9 direct or cross examination of witnesses.

10 MR. KLEIN: You are correct that we attempted to  
11 bring it out and you are correct that the Court sustained  
12 the objection.

13 THE COURT: Well, I assume you would like the  
14 jury to know that the doctor said that he had been  
15 assaulted or threatened by the defendant, that is why he  
16 wouldn't treat him. Well, we are not going that far, and  
17 so I am trying to accommodate you to the extent that the  
18 jury may be left with the impression that it was only  
19 because of the seriousness of the injuries that he was  
20 transported.

21 MR. KLEIN: And perhaps a resolution that I think  
22 would accurately state the reason without having 403  
23 issues is that the physician at Saint Mary's Hospital  
24 refused to treat him, period. And then I guess the jury  
25 can draw whatever inferences they want from that.

1           MR. DIEBOLT: Judge, I think there are several  
2 factors that play into the reason he was transported, and  
3 I think one was there were probably more surgeons that  
4 could treat him at Maricopa because it is a different  
5 center for that type of trauma. The other may be a  
6 contractual one, it may have been a lack of physicians, we  
7 have several different reasons.

8           And I am not real excited about giving them all  
9 the reasons for that. And if you want to say there were  
10 several factors including the seriousness of his injuries  
11 that he was transported to Maricopa County, I can live  
12 with that.

13           What I am saying is that we don't know that the  
14 seriousness of the injuries was not one factor that was  
15 being considered in the transport of him to Maricopa.  
16 Nobody can say that. If we can't say that, I say we avoid  
17 this issue with a stipulation from the Court.

18           THE COURT: How about a stipulation to the effect  
19 that the victim in this case was transported from Saint  
20 Mary's Hospital to the Maricopa Medical Center based on  
21 several factors including the availability of treating  
22 physicians at that facility.

23           MR. KLEIN: Well, I don't think that that  
24 accurately reflects and conveys to the jury the reason.  
25 If you wanted to say the availability of physicians



1 because the physician at Saint Mary's refused to treat  
2 him, that's accurate.

3 But where jurors ask the question and where the  
4 answer is actually given in those records, I think it is  
5 accurate to say the availability of physicians due to the  
6 refusal of the physician at Saint Mary's to treat him.  
7 And then Mr. Diebolt can argue if he wants to that that's  
8 because of the seriousness of the injuries, but that is an  
9 accurate statement without any 403 issues.

10 THE COURT: But what is the probative value of  
11 saying that the doctor refused to treat him? That's  
12 legitimate?

13 MR. KLEIN: Pardon?

14 THE COURT: The legitimate probative value?

15 MR. KLEIN: Because it was responding to the  
16 juror's question. We accepted the juror's question as  
17 being appropriate. We asked the witness --

18 THE COURT: With your concurrence.

19 MR. KLEIN: Yes, and the State's.

20 THE COURT: Yes.

21 MR. KLEIN: And so we asked the question and  
22 basically as it stands now the jury has an inaccurate  
23 answer.

24 Another way to resolve this is I would ask for a  
25 stay of the proceedings and I can subpoena Dr. Emami to

1 explain why Mr. Schwartz was transferred to Maricopa  
2 County.

3 THE COURT: I wouldn't let it in in that form  
4 either, it still has an overly prejudicial problem of 403.  
5 So what we need to do is, you can enumerate all the  
6 issues, all the reasons why without saying the doctor  
7 refused to treat him, but the fact is there was nobody who  
8 was available to treat him at Saint Mary's, and that's as  
9 much as is going to come in on that.

10 MR. DIEBOLT: The way the Court had just read it  
11 a moment ago, the latest suggestion, I want to be clear I  
12 am fine with that. The one you read just a moment ago.

13 THE COURT: Well, it doesn't emphasize the  
14 seriousness of the injuries, it just says that there were  
15 not physicians available to treat him.

16 MR. DIEBOLT: You said other factors, though, was  
17 part of your --

18 THE COURT: Yes, that there were other factors.  
19 And I am not going to continue the proceedings to call a  
20 witness that could have been called before. There were  
21 other witnesses who could have been asked this I assume,  
22 so we are in an awkward position now because we have one  
23 witness left and apparently that witness won't be able to  
24 add anything.

25 Besides that there is no real point here except

1 that there were a number of reasons that he was  
2 transported. It wasn't just because of the seriousness of  
3 his injuries and it wasn't just because there wasn't a  
4 physician there to treat him.

5 Any other record either of you wish to make? I  
6 would propose to read that stipulation to the jury. And I  
7 will state it again. The victim in this case was  
8 transported from Saint Mary's Hospital to the Maricopa  
9 Medical Center based on several factors, including the  
10 availability of treating physicians at that facility.

11 If you don't want that stipulation or if either  
12 of you disagree, then I won't give it. And then we will  
13 be where we are.

14 MR. KLEIN: Then I would ask the Court not to  
15 give that stipulation.

16 THE COURT: Very well. You may bring in the  
17 jury.

18 THE BAILIFF: Your Honor, the jury.

19 THE COURT: Please be seated. The record will  
20 show the presence of the jury, counsel and the defendant.  
21 Defense may call its next witness.

22 MS. BENSLEY: The defense calls Department of  
23 Corrections Officer Chiaravallio.

24

25

1 OFFICER CHIARAVALLLO

2 having been duly sworn, takes the witness stand and  
3 testifies as follows.

4

5 DIRECT EXAMINATION

6 MS. BENSLEY:

7

8 Q. Sir, can you introduce yourself to the jury.

9 A. I'm Officer Chiaravalllo.

10 Q. Who are you employed by?

11 A. The Arizona Department of Corrections.

12 Q. And what is your position at the Department of  
13 Corrections?

14 A. I'm a CO-2, correctional officer two.

15 Q. Are you assigned to a particular facility?

16 A. I was assigned to the Rincon unit and now it's  
17 transportation.

18 Q. Is that at the Tucson facility?

19 A. Tucson, yes.

20 Q. How long have been with the Department of  
21 Corrections?

22 A. Five years.

23 Q. On September 27th, 2008, were you also employed  
24 at the Department of Corrections?

25 A. I was.

1 Q. What was your position on September 27th?

2 A. Same position, CO-2 out of Tucson.

3 Q. Was that also involving transport?

4 A. No.

5 Q. What was your assignment, was it just a CO-2?

6 A. Just CO-2.

7 Q. How did you have the opportunity to become  
8 familiar with Bradley Schwartz before September 27th,  
9 2008? Had you had that opportunity?

10 A. I had. He got assaulted a couple times before  
11 and I have gone on transports from the yard with him, so  
12 I'm familiar, that's how I got familiar with him.

13 Q. When you say you transported him from the yard,  
14 where were you transporting him to?

15 A. From Tucson to Saint Mary's Hospital.

16 Q. And that was prior to September 27th?

17 A. That was prior, yes.

18 Q. Because of your knowledge of the other incidents,  
19 the other assaults, had you discussed the issue of safety  
20 with Mr. Schwartz? The issue of protective custody?

21 A. I believe once or twice, yes, I have.

22 Q. What was your discussion like about that, what  
23 did you discuss?

24 A. You would probably have to go back to the  
25 transcripts because I don't recall.

1       Q.    I am going to show you what has been marked as  
2 defendant's exhibits C and D. Can you take a look at  
3 those and tell me what they are.

4       A.    And tell you what they are?

5       Q.    Yes. Do you recognize those as one a transcript  
6 of an interview you did with Investigator Friedlander?

7       A.    Yes, I do.

8       Q.    And one was an interview you did with myself, Mr.  
9 Klein and Mr. Diebolt present?

10      A.    Yes.

11      Q.    Can I have you look at the defense transcript  
12 which is marked as C. If you could look at page four  
13 starting at right around line 21. Just take a second to  
14 refresh your memory.

15      A.    Excuse me?

16      Q.    Can you just take a second to refresh your  
17 memory, then I will ask you about it.

18      A.    Okay.

19      Q.    If you also want to look, I don't know if that  
20 helped you, but you can also look at defense exhibit D  
21 which is the interview with Friedlander on pages five and  
22 six, and I can give you those. On page five it is  
23 starting on line 18 to 20.

24      A.    Starting on line 13?

25      Q.    18.

1           A.     18.    Okay.

2           Q.     Do you remember then talking to him about what  
3 you call PC'ing up, which means you are in protective  
4 custody?

5           A.     Yes.

6           Q.     Can you describe for us your understanding of Mr.  
7 Schwartz' position? Did he want to enter protective  
8 custody? No? What happened?

9           A.     The only thing that I can recall is just, you  
10 know, asking him and then him just stating no. Like  
11 exhibit D shows, he didn't really respond anything past  
12 that point. He didn't go into detail or nothing.

13          Q.     And you would have these discussions about  
14 protective custody prior to September 27th, 2008?

15          A.     Yes, if that was the transport before, yes.

16          Q.     And you also had those discussions on September  
17 27th, 2008?

18          A.     I cannot recall because exhibit C shows that  
19 probably I did. I mean that's not a fact and I can't  
20 recall for sure that I actually spoke with him.

21          Q.     If you want to look then at defense exhibit D on  
22 the same page, page five. If you want to look, you can go  
23 back a little bit. Does it give you any context as to if  
24 you are talking about what your discussion was when you  
25 were at West Medical?

1           Do you remember on line 18 telling him, I said  
2 because this is what, the third, fourth time? He just  
3 stated no. He didn't really respond, he didn't say any  
4 more on that.

5           Do you remember that?

6       A.    I can't recall, I mean right now I can't recall.

7       Q.    Okay. Is that what the transcript reflects,  
8 though?

9       A.    I mean that's what the transcript says.

10      Q.    And this is from an interview that was done on  
11 April 9th, 2009 with Investigator Friedlander?

12      A.    Correct.

13      Q.    Which was closer in time than today?

14      A.    That is correct.

15      Q.    Do you think that you may remember, you may have  
16 remembered it more clearly when you were speaking to  
17 Investigator Friedlander?

18      A.    When he was up in West Medical you are asking? I  
19 am not sure what you are asking.

20      Q.    On September 27th, 2008, did you have any  
21 discussions with Mr. Schwartz about protective custody in  
22 the process of being at West Medical transport during your  
23 involvement?

24      A.    Okay. No, I mean like I said this is more recent  
25 than it is today.



1 Q. So your memory is not as clear today as it was  
2 then? Back in 2009?

3 A. I would say no because I can't remember word for  
4 word what our conversation was two years ago.

5 Q. Do you remember having a conversation at all?

6 A. I remember talking to him.

7 Q. Are you aware that Mr. Schwartz filed a lawsuit  
8 against the State and the Department of Corrections?

9 A. I am not.

10 Q. You are not aware of that?

11 MR. DIEBOLT: Relevance, Judge.

12 THE COURT: Sustained.

13 MS. BENSLEY:

14 Q. Have you personally at any time had reason to  
15 suspect that a lawsuit would result?

16 MR. DIEBOLT: Objection, relevance, Judge.

17 THE COURT: Sustained.

18 MS. BENSLEY:

19 Q. What was your personal involvement with Mr.  
20 Schwartz on September 27th, 2008? Where did you go with  
21 him?

22 A. We went from the Tucson complex to Saint Mary's  
23 Hospital and then from there, the other officer I was with  
24 flew with him in the helicopter to a hospital in Phoenix  
25 which I can't recall the name of it, I am not sure which

1 one it was.

2 Q. During that time that you were with Mr. Schwartz,  
3 was he able to tell you anything about the incident,  
4 anything about the assault? Do you recall?

5 A. No, and I tried not to harp on that conversation  
6 because he was in obvious pain.

7 Q. But he didn't tell you what had happened or who  
8 had assaulted him?

9 A. No. The only thing I remember is maybe asking  
10 him, who had assaulted him, and he did not know.

11 Q. So he wasn't able to provide you with any more  
12 information than that?

13 A. Not that I recall.

14 Q. Prior to September 27th, 2008, had you had any  
15 interactions with Mr. Wood?

16 A. Prior to that? Yes.

17 Q. And can you describe, was he a person that was  
18 easy to deal with, did you have some problems with him,  
19 disciplining him, anything like that?

20 MR. DIEBOLT: Judge, I am going to object to the  
21 nature of the question.

22 THE COURT: Sustained.

23 MS. BENSLEY:

24 Q. Do you recall any specific interactions you had  
25 with Mr. Wood prior to September 27th, 2008? If you do?

1           A.     No, no specific interactions other than any  
2 interaction I have with anybody else there.

3           MS. BENSLEY: All right. Thank you.

4           THE COURT: Cross-examination, Mr. Diebolt?

5           MR. DIEBOLT: No questions.

6           THE COURT: Jury have any questions for this  
7 witness? Thank you, officer, you may step down, you are  
8 excused.

9           Defense may call its next witness.

10          MR. KLEIN: Your Honor, the defense rests.

11          THE COURT: Very well. Ladies and Gentlemen,  
12 that means that the defense has presented all the evidence  
13 that it intends to present. Since the defense did present  
14 evidence, that gives the State the opportunity to present  
15 rebuttal evidence if they choose to do so.

16          Mr. Diebolt, does the State have any rebuttal  
17 evidence?

18          MR. DIEBOLT: Nothing further, Judge.

19          THE COURT: Then, Ladies and Gentlemen, that  
20 means you have heard all the evidence that you are going  
21 to hear in this case and what we have left to do are the  
22 closing arguments of the attorneys and then the Court's  
23 final instructions on the law.

24          Mr. Diebolt, you may proceed as soon as you are  
25 ready.

1           MR. DIEBOLT: As I mentioned yesterday, this is  
2 not factually a really complex case. It's not a long  
3 case. We started yesterday, we are finishing at least  
4 this portion of it today. And the reason I told you that  
5 is because that's what I wanted you to expect.

6           It's not complicated because it's clear as to  
7 what happened. The part that I want you to separate to  
8 some degree is that they are both incarcerated at the time  
9 in the Department of Corrections. I don't want you to  
10 think that just because they are inmates in the Department  
11 of Corrections that they lose each and every one of their  
12 rights. And I want you to understand that crimes still  
13 are committed in the Department of Corrections between  
14 inmates and those crimes are prosecuted.

15           And the reason that is is because there is still  
16 accountability and there is still responsibility of people  
17 doing harm to other people even in the Department of  
18 Corrections. And that's why we're here.

19           You have heard that the defendant attacked, and  
20 you heard nothing to the contrary, that the defendant  
21 attacked Schwartz. And you heard that he injured  
22 Schwartz. Schwartz never hit him. Never attacked him.  
23 You have seen the injuries. You have heard some of the  
24 information about the treatment that was received. You  
25 heard that the defendant himself made admissions to two

1 different people, Fairchild and Friedlander that he was  
2 the one who did it; he only used his hands.

3 What happens in cases, you may already understand  
4 this, is that the State puts on witnesses and under oath  
5 those witnesses tell you what they know about the facts of  
6 the case. At the conclusion of all that you as a group go  
7 back and say, this is a fact and this is a fact.

8 You take the group of facts and you apply it to  
9 the final jury instructions. And the final jury  
10 instructions that the judge is about to read to you is  
11 really the law, that's the law. The judge is telling you  
12 the law, we are giving you the facts. You apply the facts  
13 to the law, that's how it is done.

14 And once you apply the facts to the law, that's  
15 when you ask yourself or you ask each other that question.  
16 Am I firmly convinced that the defendant is guilty of  
17 aggravated assault causing temporary but substantial  
18 injury?

19 And it's clear that he is. There's been no  
20 evidence to the contrary. Zero.

21 I would ask you to go back in the jury room, take  
22 as much time as you like, talk about what you would like,  
23 and remember there has to be consequences even in prison  
24 for criminal behavior. Thank you.

25 THE COURT: Mr. Klein.

1                   MR. KLEIN: Thank you, Your Honor. Sorry, I  
2 should have done this before I had the chance to talk with  
3 you. May I approach?

4                   THE COURT: Yes.

5                   MR. KLEIN: It is unfortunate that Mr. Diebolt  
6 and I have different perceptions of what the evidence was  
7 in this case because obviously Mr. Diebolt believes  
8 there's absolutely no evidence to support a defense in  
9 this case. I put up there a little outline to help me  
10 remember things that I think are important in evaluating  
11 whether the State has proven its case against Jeffrey Wood  
12 beyond a reasonable doubt. That's what you are here to  
13 decide. At the beginning of this case yesterday you took  
14 an oath to decide whether the State has proven beyond a  
15 reasonable doubt that Jeffrey Wood is guilty.

16                   I do agree with one thing that Mr. Diebolt said  
17 and that is whether someone is in prison or not in prison,  
18 they are entitled to be protected by the law. That's true  
19 of Mr. Schwartz who was in prison back in September of  
20 2008 and it's also true of Jeffrey Wood who was in prison  
21 back in September of 2008.

22                   What do I mean by that? What I mean is that the  
23 instructions the judge is going to give to you that are  
24 based on what the law is, what the constitutional rights  
25 of any person in the United States who has to face the

1 strength and power of the government are when they are  
2 being prosecuted for a criminal offense, those apply to  
3 Jeffrey Wood just as they do to any other person in the  
4 United States of America. And the day we don't allow that  
5 to happen is a very, very sad day indeed.

6           Before I get into talking about the evidence, on  
7 behalf of Jeff and Sandra and I am sure Mr. Diebolt as  
8 well, I would like to thank you for your attention during  
9 this trial. As Mr. Diebolt said, it wasn't a case where  
10 you had to listen to evidence over weeks and weeks. But  
11 nevertheless it is a very important case. And  
12 nevertheless the rules, the protections, the  
13 constitutional rights apply to every citizen, apply to  
14 Jeffrey Wood as well as they do to Bradley Schwartz.

15           So let's talk a little bit about the evidence.  
16 Mr. Diebolt said there is no dispute about what happened.  
17 Well, I guess there is no dispute if you think that  
18 Bradley Schwartz is telling the truth.

19           So let's start off with that. And address the  
20 question, did the fight happen the way Bradley Schwartz  
21 said it happened?

22           Now the first thing that I put up there is it  
23 conflicts with the physical evidence. And let me tell  
24 you, I am going to be showing you some pictures and they  
25 are probably not the bloodiest of the pictures that have

1    been admitted into evidence.    If these pictures make any  
2    of you squeamish, I apologize.    You know, when we were  
3    talking at the beginning and asking you questions, we  
4    should have asked of the whole panel whether any of you  
5    feel uncomfortable looking at pictures where blood is  
6    shown.

7                    And I hope, even though we didn't ask you this,  
8    that you will be able to evaluate these photographs  
9    unemotionally.    But let's look at this first picture.  
10   This is State's exhibit number five.    It is admitted into  
11   evidence, it will go back with you when you are  
12   deliberating.

13                   Bradley Schwartz told Investigator Friedlander,  
14   he told Ms. Bensley and myself in an interview where Mr.  
15   Diebolt was present and he testified yesterday that this  
16   incident happened while Jeffrey Wood was drinking at the  
17   water fountain and he was standing directly across from  
18   the water fountain.    And then in very creative words he  
19   said, without anything happening Jeffrey Wood wheeled  
20   around and punched me and I went down like a sack of  
21   potatoes.

22                   That's a beautiful image, beautiful literature.  
23   But it is not reality.    Because if that had happened, you  
24   would see blood directly across from the water fountain.  
25   And you can look at this picture until you are blue in the



1 face and there is not a single drop of blood in this  
2 picture directly across from the water fountain. Indeed  
3 the closest blood appears to be pretty much a room's width  
4 away if you line it up with the blood that is off to the  
5 side. That's not even across from the water fountain.

6           So in addressing whether the fight happened the  
7 way Bradley Schwartz said it happened, a picture is worth  
8 a thousand words. And fortunately for you I'm not going  
9 to use a thousand words. Just look at this picture, it  
10 didn't happen that way.

11           The next problem with answering the question of  
12 whether it happened the way Bradley Schwartz said it  
13 happened was his own statement. Let's follow through with  
14 what happened when I showed Bradley Schwartz this picture.  
15 His answer was, well, I must have tumbled and rolled after  
16 he hit me. Well, number one, obviously that's  
17 inconsistent with what he previously said.

18           But even, even if that is what happened, again  
19 the picture doesn't substantiate that because if he is hit  
20 and he goes down like a sack of potatoes and then he  
21 rolls; look all along that wall, on the opposite side from  
22 the water fountain and there is not a drop of blood until  
23 you get past two separate classroom doors.

24           Now if he has been hit and if he goes down like a  
25 sack of potatoes and if Jeffrey Wood is continuing to

1 strike him, don't you think that there would be at least  
2 even a little bit of a trail of blood? Not a drop.

3 But there were other inconsistencies as well, not  
4 only in terms of what happened, but also in terms of his  
5 symptoms. For example, when he was interviewed by  
6 Investigator Friedlander back in October of 2008, a little  
7 less than actually a month later, he was very specific  
8 with Mr. Friedlander. He said the first punch hit me  
9 square right between the eyes. He admitted that.

10 When he talked with Ms. Bensley and myself, Mr.  
11 Diebolt being present, he said with the first punch he  
12 wheeled around and hit me right on the side of the head.  
13 So I asked him, you know, obviously, this whole sequence  
14 of events kind of gets confusing over time but isn't the  
15 first blow that you got the most memorable? Remember what  
16 he said?

17 There is one inconsistency. Next there is a very  
18 interesting string of inconsistencies. Because when Ms.  
19 Bensley interviewed him back in January, we asked him, did  
20 you ever lose consciousness?

21 And he said, well, not while the fight was going  
22 on. But once the corrections officers arrived, yes, I did  
23 black out for five to ten minutes. We had a little  
24 discussion there and I had to show him the transcript of  
25 our interview and he admitted yes, that's what he had

1 said.

2 Interestingly enough Nurse Quattlebaum dealt with  
3 him right when the corrections officers were dealing with  
4 him and her testimony was he was alert and oriented. He  
5 knew his name, he knew his place, he knew time. That's  
6 not somebody who blacked out.

7 And then she met with him as well in the medical  
8 unit at the West Unit at the prison and he was so alert  
9 that he was able to say, call my lawyer, and I want a  
10 plastic surgeon. That's not somebody who is blacked out.

11 Then continuing on, interestingly enough when he  
12 was transported in the ambulance, all of a sudden with  
13 Corrections Officer Rayot he says, oh, I don't know why I  
14 am here, what's going on, I'm totally confused.

15 And then as soon as he arrives at Saint Mary's  
16 Hospital he's back in touch with reality, he's giving  
17 directions to the doctors, telling them what to do, what  
18 medicine to give him, everything. And he continues that  
19 all the way up to Maricopa County Hospital.

20 Is that a man who is being consistent in his  
21 statements, or is that a man who is trying to manipulate  
22 the medical center and he is also trying to manipulate the  
23 legal system? I think the answer is pretty obvious what  
24 he's up to.

25 Even in terms of the symptoms that he claims he

1 is having. Let's start with his double vision. I don't  
2 know how you test double vision other than asking  
3 somebody, do you see two images? Mr. Schwartz admitted  
4 that that condition, double vision, is something called  
5 diplopia, D. I. P. L. O. P. I. A. I think and he said he  
6 is still suffering from it even today.

7           And yet I asked him about a report prepared by  
8 one of the doctors up in Maricopa County back on February  
9 10th of 2009. And you remember I asked him, I started a  
10 sentence with, well, doesn't that report show, and I  
11 started the sentence in the report that says, when asked,  
12 and he continued reading, the patient denies any diplopia  
13 or intermittent diplopia and droopy lid.

14           Dr. Schwartz read that to you from the report  
15 from Maricopa County Hospital, February 10th, 2009.

16           Now this report is not going back into evidence,  
17 into your jury deliberation room. But the testimony of  
18 Dr. Schwartz, his admission that this is what the report  
19 said, is admissible. The only reason I'm telling you that  
20 is because the judge is going to give you an instruction  
21 about what the evidence is in the case and he will tell  
22 you that the evidence is the testimony of witnesses and  
23 the exhibits that you are taking back with you that have  
24 been admitted into evidence.

25           Even though that document itself is not admitted

1 into evidence, the testimony of Dr. Schwartz, Mr. Schwartz  
2 is admitted into evidence. It is his testimony, it is his  
3 acknowledgement of what he told the doctors roughly five  
4 months after this incident occurred.

5 No diplopia. He gets up here under oath and  
6 swears he's got diplopia. Is that somebody that you can  
7 believe when he says what happened in this case?

8 And there's even more inconsistencies. He  
9 testified he is suffering from a loss of his taste, he is  
10 suffering from a loss of his sense of smell. And when I  
11 asked him, well, when you spoke with Ms. Bensley and me  
12 and Mr. Diebolt back in January of this year, did you ever  
13 mention that as a problem that you were continuing to  
14 have?

15 And he had to admit, no, he never mentioned that.

16 All of these inconsistencies, maybe on their own  
17 they don't reasonably make you think, okay, we are going  
18 to throw out what he says. But when you add that to the  
19 conflicts with the physical evidence, the photographs, and  
20 then let's continue.

21 His motive. Does he have a motive to lie in this  
22 case? That's one of the points that the judge is going to  
23 talk with you about in deciding whether you believe a  
24 witness's testimony. Their credibility as a witness, do  
25 they have a motive? You bet you Mr. Schwartz has a

1 motive, he's trying to sue the Department of Corrections  
2 for failing to provide him with adequate safety.

3 And he's got to show that they didn't provide him  
4 with adequate safety and he's got to show that as a result  
5 of that he suffered physical injuries. So he's got a real  
6 powerful motive to make up a story.

7 Now obviously he didn't make up a story about  
8 being bloody and being injured, but the circumstances of  
9 what happened, you bet he's got a motive for that. Not  
10 only did he have a motive for the lawsuit, but he was  
11 given the opportunity by the Department of Corrections to  
12 quote, PC up. Now admittedly that's not a great situation  
13 because you don't have absolutely free access to the yard  
14 like somebody in general population has.

15 But I remember, many of you are too young to  
16 remember when John Kennedy was president. But I remember  
17 a quotation from President Kennedy. And it was something  
18 to the effect of the most difficult part of the job of  
19 president is not having to decide between good and bad  
20 choices, but having to decide between bad choices and  
21 which is the lesser of two evils.

22 And that's what Mr. Schwartz had to decide, and  
23 he decided to remain in semi general population. Remember  
24 he was in unit six, housing unit six and that was kind of  
25 a hybrid unit, you still had open access, you didn't have

1 PC restrictions. But you weren't technically in general  
2 population.

3 And so he decided to stay there, and in doing so  
4 make his lawsuit so much better because it increased the  
5 risk that something might happen to him. Because he knew  
6 he had previously been beat up by other inmates on  
7 previous occasions. He had been offered the opportunity  
8 to go into protective custody. He didn't want anything of  
9 it because, his words, the Department of Corrections has  
10 the responsibility of keeping me safe and I am  
11 Mr. Schwartz and I don't care what you do to other inmates  
12 to keep them safe, for me you have got to let me stay in  
13 general population and then what, provide an armed guard  
14 wherever I go?

15 It was also interesting to hear what Mr. Schwartz  
16 had to say about his option to be put into protective  
17 custody. Because according to him, oh, that was hardly  
18 ever offered. And in fact the only time that really I had  
19 anything to say about it was when the deputy warden forced  
20 me to sign the paper.

21 Well, he admitted the paper that supposedly the  
22 deputy warden had him sign didn't have anything to do with  
23 whether he went into protective custody, it had to do with  
24 the other inmate. And he also admitted that for example  
25 Officer Chiaravallo, the last witness who testified,

1 didn't have any grudge against Mr. Schwartz. And although  
2 Officer Chiaravallo's recollection today wasn't very good,  
3 his recollection back when he was interviewed by  
4 Investigator Friedlander back in April of 2009 was that in  
5 fact prior to September 27th of 2008 he had had  
6 discussions with Mr. Schwartz about being put in  
7 protective custody and Mr. Schwartz said no, the  
8 Department of Corrections has to provide protection for  
9 me, I'm not going into protective custody.

10           The next in connection with can you believe what  
11 Brad Schwartz has to say about what happened is the fact  
12 that he's previously been convicted of a felony. And not  
13 only has he previously been convicted of a felony, but he  
14 pled guilty to an offense in Federal Court. The judge is  
15 going to give you an instruction that talks about things  
16 that you can consider in addressing the credibility of a  
17 witness. And one of those things is whether that witness  
18 has a prior conviction or has pled guilty previously.

19           So that's another factor to consider in deciding  
20 whether you believe what Brad Schwartz has to say. And  
21 you know, it's very interesting about that guilty plea.  
22 The guilty plea was to a charge of conspiracy to obtain  
23 illegal drugs by fraud or deceit. Lying. That directly  
24 relates to his credibility and particularly when you  
25 consider his explanation of that.



1           Well, on direct examination, you know, I had this  
2 intense pain and I was just so busy as a doctor I couldn't  
3 take the time so I asked my office assistant to get me  
4 these illegal, I wrote out a prescription for her and I  
5 asked her to get me these drugs.

6           I can't read your minds but I suspect when you  
7 heard that you thought, well, that makes sense, he's very  
8 busy, he's in pain and one time he asks his office  
9 assistant to go out and do this. So then on cross  
10 examination we went into a little more detail about that.  
11 Mr. Schwartz, isn't it true that it wasn't just your  
12 office assistant? And he admitted, no, actually there was  
13 at least one or two other people that he asked to do this.

14           And Mr. Schwartz, isn't it true that this  
15 happened more than once? Yeah, that's true.

16           I mean, well, let me just slide into the next  
17 classification. His character. Brad Roach is a lawyer  
18 who used to work in the County Attorney's Office. He knew  
19 Bradley Schwartz. He had socialized with him, he had  
20 talked with other people in the community about him.

21           His opinion, number one, is that Mr. Schwartz, I  
22 think the answer was he's not capable of telling the  
23 truth. Now sure he will be able to say his name, he will  
24 be able to say simple things, but you kind of got a  
25 picture of that when he testified, because he would

1   testify about something, for example the fight in the  
2   hall, this is what happened. Then he's shown other  
3   evidence, then he backs off when he is shown what the  
4   other evidence shows that he's not telling the truth. And  
5   he makes an excuse.

6               And low and behold even when he's making an  
7   excuse, it's still not substantiated by the evidence.  
8   That's his character for truthfulness. And his character  
9   for aggressiveness, his character for aggressiveness is as  
10  Mr. Roach said, if it will benefit him, he will be  
11  aggressive.

12              And that goes back exactly to his motive.

13              Well, come on, Mr. Klein, Jeffrey Wood said he  
14  did it. What doubt can there be? Well, there's a couple  
15  of things and one interestingly enough was pointed out by  
16  Mr. Diebolt when he was talking, when he was questioning  
17  Bradley Schwartz. Because he asked Bradley Schwartz,  
18  isn't there kind of a code in the Department of  
19  Corrections?

20              Mr. Schwartz said something like, I don't know,  
21  what do you mean? Eventually he wound up testifying,  
22  telling you that in the Department of Corrections if you  
23  are confronted you don't snitch off other people. You  
24  don't say, oh, so and so did this or so and so did this or  
25  so and so did anything, you don't snitch somebody off.

1           So when you hear that Jeffrey Wood told Julie  
2 Fairchild, I'm the only one, keep that code of silence in  
3 mind. And when you hear that Jeffrey Wood said to  
4 Investigator Friedlander, how is the guy, how is he doing?  
5 I didn't mean to hurt him. Keep that code of silence in  
6 mind.

7           More importantly when you think about the State's  
8 theory that Jeffrey Wood without any provocation just  
9 hauls off and hits Bradley Schwartz, why would he do that?  
10 And then why when he's asking or he's talking with  
11 Investigator Friedlander if in fact he did that, why would  
12 he then say, I didn't mean to hurt him. It's not, I  
13 didn't mean to hurt him that bad; it is, I didn't mean to  
14 hurt him, period.

15           Now the other thing that is also interesting  
16 about Investigator Friedlander's conversation with Jeffrey  
17 Wood is what else he said. Because what he said was, I  
18 only hit him with my fist, I didn't kick him. Well,  
19 interestingly there is no blood observed on Jeffrey Wood's  
20 physicians, on his hands. The only thing that the State  
21 is claiming is blood is on Jeffrey Wood's shoes and on his  
22 pants. These are photographs that you are going to have.  
23 Let's see if I can hold three up at one time. These are  
24 photographs that you are going to have, they are State's  
25 exhibits S, T and U, of what supposedly is blood on

1 Jeffrey Wood's shoes and his pants.

2           What I want you to also do when you are looking  
3 at these is look at the blood that's in the hallway. And  
4 remember Jeffrey Wood says, I only hit him with my hands,  
5 I never kicked him. There are a couple of things about  
6 this. First of all looking at these photographs you can  
7 see the stains appear to be dry, they're not wet blood  
8 stains. And then if you look at those stains on the  
9 shoes, they are kind of a pinkish color, they're not red  
10 like the blood you will see in the photographs of the  
11 hallway. So the question then is do we really know that  
12 these stains are blood stains or that they are blood  
13 stains from this conduct with Bradley Schwartz? Do we  
14 really know that?

15           Because looking at these photographs, you would  
16 expect blood stains to be wet, they're not wet. Looking  
17 at these photographs you would expect the blood to still  
18 be red; if you think of your own experiences when you cut  
19 yourself, blood comes out red and when it dries it becomes  
20 sort of a brownish color. Right?

21           That's not what is depicted in these photographs.  
22 And beyond that, looking at the blood that's in the  
23 hallway, don't you think that if Jeffrey Wood had kicked  
24 and pummeled Bradley Schwartz the way Schwartz claims,  
25 that there might be a little more staining than appears on

1 these shoes?

2           And it's not as if Jeffrey Wood had the chance to  
3 go down the hall, go into the bathroom and wash off  
4 anything like that. First of all you can see that his  
5 shoes and his pants aren't wet. So what happened to this  
6 blood? This profuse amount of bleeding from the pummeling  
7 that Bradley Schwartz took?

8           Well, it would be real nice if we had those  
9 pants. If we had those shoes. So that we could do simple  
10 laboratory tests. Take a little swab, cut a little  
11 section off of the pants and evaluate, number one, whether  
12 it's actually blood; and evaluate, number two, if it is  
13 blood, whether it's Bradley Schwartz's blood. But we  
14 can't do that because somewhere, somehow within the  
15 Department of Corrections when they are doing this  
16 investigation over months, oops, we don't have the shoes,  
17 we don't have the pants.

18           Well, you know, it's the burden of the State to  
19 prove their case beyond a reasonable doubt. And if the  
20 State has lost evidence, if the State has failed to  
21 preserve evidence, then that evidence doesn't exist. So  
22 when those witnesses came in and said those were blood  
23 stains, looks like blood, blah, blah, blah; and when I  
24 asked Investigator Friedlander from your experience as a  
25 detective in law enforcement, as a special investigator

1 for the Department of Corrections, can you say that those  
2 stains are blood? He said no, he can't.

3 Why? Because the simple test that you can do to  
4 determine whether they are blood and whose blood they may  
5 be, they can't do because somehow they lost the evidence.

6 As I was talking with you I remembered another  
7 inconsistency that I was going to mention to you and I  
8 apologize for going back. But remember when Mr. Schwartz  
9 testified, he commented, oh, yeah, I think Jeffrey Wood  
10 made several derogatory remarks about Mr. Schwartz's  
11 religion. That is what he said when he was testifying.

12 So I asked Investigator Friedlander, when you  
13 spoke with him you asked him what happened?

14 Yes.

15 And at any time when you were talking with him  
16 less than a month after this happened, did he ever say  
17 that Jeffrey Wood made a derogatory comment about his  
18 religion?

19 No.

20 Mr. Schwartz was struck down like a sack of  
21 potatoes. The scene down the hallway was like the Texas  
22 Chainsaw Massacre. And then in front of you he kept those  
23 emotions raising up in your hearts and in your souls.  
24 Jeffrey Wood made some derogatory comments about his  
25 religion. You know that creative writing class in Mr.

1 Schwartz's words may not have really been a class, it was  
2 just an opportunity to talk about things, but he sure  
3 learned a lot in that class. And unfortunately what he  
4 learned had nothing to do with telling the truth.

5           When I get done Mr. Diebolt will have a chance to  
6 talk with you. And at this point he is going to be able  
7 to respond to all those points. I wish I could read his  
8 mind like I wish I could read your mind but I can't. I  
9 flunked mind reading in law school. I don't know what he  
10 is going to say, all I do know is that no matter what he  
11 says I am not going to have a chance to respond to that.

12           So I am going to ask you to do one very simple  
13 thing after you have had a chance to listen to him and  
14 when you go retire and deliberate on the case. Think  
15 about all the evidence in the case, apply the evidence, or  
16 the lack of evidence to the instructions that the judge is  
17 going to give you. Don't just rely on what I say, don't  
18 just rely on what Mr. Diebolt says. Particularly when I  
19 don't have a chance to respond.

20           But ideas back and forth among you and when you  
21 come up with some idea of what the evidence is, there's  
22 one critical, critical instruction that the judge will  
23 give you. That should be your guide for how you evaluate  
24 the evidence. And that is the State's burden of proof.  
25 And it would be lovely if we could give you, well, proof

1 beyond a reasonable doubt is 79.43 percent of the  
2 evidence, but we can't. What we can do is kind of  
3 describe it to you. And we can tell you what it is not.

4           So let me try to do that and hopefully that will  
5 make it a little easier to understand what it is. Like I  
6 say I can't read your minds. But if you are sitting back  
7 there saying, you know, I think probably Jeffrey Wood  
8 committed aggravated assault. If you are thinking  
9 probably he did it, then you must find him not guilty.  
10 Because proof beyond a reasonable doubt is more than just  
11 the mere probability that the State has proven its case.

12           If you are thinking, you know, it is highly  
13 probable that Jeffrey Wood committed aggravated assault;  
14 you know what your verdict is? Your verdict is not  
15 guilty. Because highly probable is not the same as proof  
16 beyond a reasonable doubt.

17           And if you are thinking, you know, I am convinced  
18 that Jeffrey Wood committed aggravated assault; even if  
19 you are convinced, your verdict is still not guilty. Hard  
20 to believe but the judge is going to instruct you that in  
21 order for you to come back with a verdict of guilty in  
22 this case, you have to be firmly convinced that Jeffrey  
23 Wood is guilty. Not just being convinced but being firmly  
24 convinced; then and only then can you come back with a  
25 verdict of guilty.



1           So Ladies and Gentlemen, on behalf of Jeff,  
2 Sandra and myself, we would very much like to thank you  
3 for your attention throughout the trial, particularly  
4 during my closing argument. And the only thing I am going  
5 to ask you to do is as you retire to deliberate, think  
6 about the evidence, think about the law and simply follow  
7 your oath that you took at the beginning of this case.  
8 And I hope that will be that you find Jeffrey Wood not  
9 guilty. Thank you.

10           THE COURT: Mr. Diebolt, you may rebut.

11           MR. DIEBOLT: I have listened to alot of closing  
12 arguments from defense, so I look at it from a different  
13 perspective because I do this on a regular basis. So I  
14 probably hear or don't hear things that maybe you do. But  
15 I want you to think about the following. Counsel doesn't  
16 say his client didn't do it. He says that he doesn't want  
17 you to believe everything that Brad Schwartz says. Not  
18 once did he say his client was innocent. He just doesn't  
19 want you to believe everything that Brad Schwartz says.

20           Did it happen here, did it happen a few feet  
21 away; was he hit fifteen times or 20 times; was he first  
22 hit on the side of the head or straight between eyes? I  
23 hope none of you have been struck before in the nose or  
24 eyes or the head, I will unfortunately say that I have.  
25 It does disorient you.

1           MR. KLEIN: Judge, I am going to object to Mr.  
2 Diebolt testifying.

3           THE COURT: Sustained.

4           MR. DIEBOLT: Any time somebody gets hit in the  
5 head or the face or the eyes or the nose, especially the  
6 nose, it's going to disorient you.

7           MR. KLEIN: Your Honor, the same objection.

8           THE COURT: Overruled.

9           MR. DIEBOLT: And that disorientation may cause  
10 some memory issues. But that's, so if you don't get every  
11 single thing right, does that mean that that man is not  
12 guilty of aggravated assault? Of course not. It would be  
13 a sad day if people in the Department of Corrections could  
14 do whatever they wanted to other inmates and get away with  
15 it. That would be not only a sad day but it would be  
16 anarchy. It would be more uncivilized in an already  
17 partially uncivilized society that we live in.

18           The evidence that has been presented to you is  
19 clear to the point about what happened. There's nothing  
20 to contradict it. Nothing. You know, the lawsuit you can  
21 factor in however you want to factor it in. One way of  
22 looking at the lawsuit is this is the fourth time he got  
23 his butt kicked and he's done with it. And being in  
24 protective custody you have heard is like being stuck in a  
25 box. You are already in prison, then you get stuck in the

1 hole. I will take my chances outside in the larger area  
2 rather than be stuck 23 hours in your cage. 23 hours in  
3 protective custody.

4 I think when Brad Schwartz was asked about  
5 something being memorable, he said none of it was  
6 memorable; I think that was his response.

7 When Wood said something to Investigator  
8 Friedlander, he says that he struck the victim only with  
9 his hands. Now you can interpret that however you want.  
10 How I understood that to be the case is that he was saying  
11 he didn't have any weapons in his hands, that he used his  
12 hands. He never said I didn't kick him, he never said I  
13 didn't kick him.

14 The instruction about proof beyond a reasonable  
15 doubt is an important instruction. And I suppose all the  
16 ones the Court gives you are important, some apply more  
17 than others. But the one about proof beyond a reasonable  
18 doubt is really the proof that leaves you firmly  
19 convinced. So you can take those two words, firmly  
20 convinced, and tie that into proof beyond a reasonable  
21 doubt. If you look at the big picture, can I use the  
22 easel, Judge?

23 THE COURT: Yes.

24 MR. DIEBOLT: Thank you. There is a concept,  
25 sort of an analogy, I can't ask you questions and have you

1 answer out loud. So I have to assume that, I know none of  
2 you do this for a living so that maybe you don't have a  
3 full understanding of proof beyond a reasonable doubt. So  
4 I am going to draw a map. I have just drawn a few things  
5 there for you to look at. And the reason I have drawn  
6 those is so that I can identify the Santa Catalina  
7 Mountains, San Xavier Del Bac Mission, McKale Basketball  
8 and Activity Center, A Mountain and the University of  
9 Arizona.

10           And I have just given you five things and I have  
11 drawn those to ask you a rhetorical question, not to  
12 answer out loud, but I am going to ask you to step back  
13 and look at the big picture and say, am I firmly convinced  
14 that is Seattle? No. I am not firmly convinced that is  
15 Seattle.

16           Am I firmly convinced that is Tucson, Arizona?  
17 Well, you should be. I have only given you five things or  
18 a few things, I haven't drawn each and every little detail  
19 of Tucson to convince you of that. And that is what the  
20 law really requires is that you take a step back, use your  
21 common sense, life experiences and look at that and say,  
22 yeah, I am firmly convinced that is Tucson based on the  
23 information I have.

24           And that is what I am asking you to do, step  
25 back, use your common sense, life experiences, reasonable

1 inferences and say, yeah, I am firmly convinced that he  
2 did it. Why did he do it? Maybe he doesn't, there can't  
3 be alot of -- well, you can draw your conclusions of why  
4 it happened. We can talk about why it may have happened.  
5 Bradley Schwartz told you he is identified as doc. Can't  
6 be alot of doctors in the Department of Corrections. You  
7 can do a survey but there can't be alot.

8           So when you are in there and you are a small  
9 little I will say Jewish doctor, can't be alot of them,  
10 maybe that draws more attention than he deserves. Or  
11 maybe he deserves the attention but he doesn't deserve to  
12 get his butt kicked on a regular basis and that's why we  
13 are here today. Thanks.

14           THE COURT: Ladies and Gentlemen, I want you to  
15 keep the notes that you took during the trial but pass the  
16 notebooks, the three ring notebooks to the left so that  
17 the bailiff can collect them.

18           The bailiff will now pass out to you copies of  
19 the Court's final instructions on the law. I will read  
20 these to you as we did with the earlier instructions and I  
21 ask you to read them along with me. You will have these  
22 instructions with you with you throughout your  
23 deliberations so if you have a need to refer back to them,  
24 you may.

25           I am now going to tell you the rules you should

1 follow to decide this case. It is your duty to follow  
2 these instructions.

3           It is also your duty to determine the facts only  
4 from the evidence produced in Court. When I say evidence,  
5 I mean the testimony of witnesses and the exhibits that  
6 have been introduced during the trial. You must not  
7 speculate or guess about any fact. You must not be  
8 influenced by sympathy or prejudice and you should not be  
9 concerned with any opinion you may feel I have about the  
10 facts. You are the sole judges of the facts.

11           You must consider all of these instructions. Do  
12 not pick out one instruction or part of one and ignore the  
13 others. As you determine the facts, however, you may find  
14 that some instructions no longer apply. You must then  
15 consider the instructions that do apply together with the  
16 facts as you have determined them.

17           Nothing said or done by the lawyers who have  
18 tried this case is to be considered by you as evidence of  
19 any fact. Opening statements of the lawyers are intended  
20 to give you a brief outline of what each side expects to  
21 prove so that you may better understand the evidence. The  
22 closing arguments are often very helpful in refreshing  
23 your recollection as to the evidence. However, your  
24 verdict should be based not upon the lawyers' statements  
25 but upon the evidence.

1           The function of the lawyers is to point out those  
2 things that they consider to be most significant. And in  
3 doing so to call your attention to certain facts or  
4 inferences that might otherwise escape your notice. What  
5 the lawyers say is not binding upon you. If your memory  
6 of the evidence differs from what the lawyers have  
7 represented it to be, it is your memory that controls. If  
8 you believe that the law as represented by the attorneys  
9 differs from the law as given by the Court, it is the  
10 Court's instructions on the law that control.

11           The State has the burden of proving the defendant  
12 guilty beyond a reasonable doubt. This means the State  
13 must prove each element of the charge beyond a reasonable  
14 doubt. In civil cases it is only necessary to prove that  
15 a fact is more likely true than not, or that its truth is  
16 highly probable. In criminal cases such as this, the  
17 State's proof must be more powerful than that. It must be  
18 beyond a reasonable doubt.

19           Proof beyond a reasonable doubt is proof that  
20 leaves you firmly convinced of the defendant's guilt.  
21 There are very few things in this world that we know with  
22 absolute certainty. In criminal cases the law does not  
23 require proof that overcomes every doubt. If based on  
24 your consideration of the evidence you are firmly  
25 convinced that the defendant is guilty of the crime

1 charged, you must find the defendant guilty. If on the  
2 other hand you think there's a real possibility that the  
3 defendant is not guilty, you must give him the benefit of  
4 the doubt and find him not guilty.

5           The law does not require a defendant to prove  
6 innocence. The defendant is presumed by law to be  
7 innocent. You must start with the presumption that the  
8 defendant is innocent.

9           The State must prove all of its case against the  
10 defendant with its own evidence. The defendant is not  
11 required to testify, call witnesses, attend trial or  
12 produce evidence. The decision on whether to do these  
13 things is left to the defendant acting with the advice of  
14 his attorney. You must not let these choices affect your  
15 deliberations in any way.

16           The State has charged the defendant with the  
17 crime of aggravated assault. The defendant is presumed  
18 innocent. You must not think the defendant is guilty just  
19 because of these charges. The defendant has pled not  
20 guilty. This plea of not guilty means that the State must  
21 prove every part of these charges beyond a reasonable  
22 doubt.

23           The crime of aggravated assault requires proof  
24 that the defendant committed assault, which requires proof  
25 that the defendant intentionally, knowingly or recklessly



1 caused a physical injury to another person.

2           And the assault was aggravated by the fact that  
3 the defendant committed the assault by any means of force  
4 that caused temporary but substantial disfigurement,  
5 temporary but substantial loss or impairment of any body  
6 organ or part, or a fracture of any body part.

7           Intent or intentionally as used in these  
8 instructions means that a defendant's objective is to  
9 cause that result or to engage in that conduct.

10           Intent may be inferred from all the facts and  
11 circumstances disclosed by the evidence. It need not be  
12 established exclusively by direct sensory proof. The  
13 existence of intent is one of the questions of fact for  
14 your determination.

15           Recklessly means that a person is aware of and  
16 consciously disregards a substantial and unjustifiable  
17 risk that conduct will result in physical injury to  
18 another person.

19           The risk must be such that disregarding it is a  
20 gross deviation from what a reasonable person would do in  
21 the situation.

22           Knowingly means the defendant acted with the  
23 awareness of the existence of conduct or circumstances  
24 constituting an offense. It does not mean that a  
25 defendant must have known the conduct is forbidden by law.

1           You have heard evidence of the victim's character  
2 for aggressiveness and dishonesty. In deciding this case  
3 you should consider that evidence together with and in the  
4 same manner as all the other evidence in the case.

5           Neither side is required to call as witnesses all  
6 persons who are shown to have been present at any of the  
7 events involved in the evidence, or who may appear to have  
8 some knowledge of the matters in question in this trial;  
9 nor is either side required to produce as exhibits all  
10 objects or documents that have been referred to in the  
11 testimony or the existence of which may have been  
12 suggested by the evidence.

13           You must not consider any statements made by the  
14 defendant to a law enforcement officer unless you  
15 determine beyond a reasonable doubt that the defendant  
16 made the statements voluntarily. The defendant's  
17 statement was not voluntary if it resulted from the  
18 defendant's will being overcome by a law enforcement  
19 officer's use of any sort of violence, coercion or  
20 threats, or by any direct or implied promise, however  
21 slight. You must give such weight to the defendant's  
22 statement as you feel it deserves under all the  
23 circumstances.

24           In deciding whether the defendant is guilty or  
25 not guilty, you must not consider the possible sentence or

1 punishment that could result. Punishment is left to the  
2 Court.

3 Evidence may be direct or circumstantial. Direct  
4 evidence is direct proof of a fact such as testimony by a  
5 witness about what that witness personally saw or heard or  
6 did. Circumstantial evidence is indirect evidence, that  
7 is, it is proof of one or more facts from which one can  
8 find another fact.

9 For example, if you wake up in the morning and  
10 you see puddles of water on the ground, you may find from  
11 that fact that it had rained during the night, even though  
12 you did not see it rain.

13 However, other evidence such as a turned-on  
14 garden hose may explain the puddles. Therefore before you  
15 decide a fact has been proven by circumstantial evidence,  
16 you must consider all the evidence in the light of reason,  
17 experience and common sense.

18 You are to consider both direct and  
19 circumstantial evidence. The law permits you to give  
20 equal weight to both. It is for you to decide how much  
21 weight to give any evidence.

22 The testimony of a law enforcement officer is not  
23 entitled to any greater or lesser importance or  
24 believability merely because of the fact that the witness  
25 is a law enforcement officer. You are to consider the

1 testimony of a police officer just as you would the  
2 testimony of any other witness.

3           Not all exhibits marked and used during the trial  
4 are admissible. Only those exhibits admitted into  
5 evidence may be in the jury deliberation room and used by  
6 the jury during deliberations.

7           In deciding the facts of this case you need not  
8 accept all the evidence as true or accurate. You as the  
9 jurors are the sole judges of the credibility of a witness  
10 and the weight of the evidence. The credibility of a  
11 witness means the extent to which you believe the witness.  
12 The weight of the evidence means the extent to which you  
13 are or are not convinced by the evidence.

14           You should carefully evaluate the testimony  
15 given, the circumstances under which the witness has  
16 testified and every matter in evidence that tends to  
17 indicate whether the witness is worthy of belief.

18           In evaluating testimony you should use the tests  
19 for truthfulness that people use in determining matters of  
20 importance in everyday life, including such factors as the  
21 witness's memory or lack of memory.

22           The witness's interest or lack of interest in the  
23 outcome of the trial.

24           The witness's relationship to any of the parties  
25 or other witnesses.

1           The witness's demeanor and manner while  
2   testifying.

3           The witness's ability to see or hear or know the  
4   things about which he or she testified.

5           The reasonableness of his or her testimony when  
6   considered in light of all the other evidence.

7           The witness's demonstrated fairness or  
8   unfriendliness for or against any party.

9           Whether the witness was contradicted by anything  
10   the witness said, wrote or did before trial.

11          Consider all the evidence in the light of reason,  
12   common sense and experience.

13          The verdict must represent the considered  
14   judgment of each juror. It is necessary that each juror  
15   agree to the verdict. In other words, your verdict in  
16   this case if you return a verdict must be unanimous.

17          It is your duty as jurors to consult with one  
18   another and to deliberate in an effort to reach a verdict,  
19   if you can do so without violating your individual  
20   judgment. Each of you must decide the case for yourself.  
21   But do so only after an impartial consideration of the  
22   evidence with the other jurors.

23          In the course of your deliberations do not  
24   hesitate to re-examine your own views and change your  
25   opinion if you became convinced that it is erroneous. But

1 do not surrender your honest convictions as to the weight  
2 or the effect of the evidence solely because of the  
3 opinion of the other jurors for the mere purpose of  
4 returning a verdict.

5 In arriving at a verdict, the possible punishment  
6 is not to be discussed or considered and must not in any  
7 way affect your decision as to the guilt or innocence of  
8 the defendant.

9 All eight of you must agree on a verdict. All  
10 eight of you must agree whether that verdict is guilty or  
11 not guilty.

12 When you go to the jury room the first thing you  
13 will do is choose a foreperson who will be in charge  
14 during your deliberations and who will sign any verdict.

15 You will be given one verdict form on which to  
16 indicate your decision. And I hold that form in my hand,  
17 Ladies and Gentlemen. It has the caption of the case at  
18 the top and then it states, we the jury duly impaneled and  
19 sworn in the above entitled action upon our oaths do find  
20 the defendant, Jeffrey Allen Wood, then there's a blank  
21 space for you to fill in either the words not guilty or  
22 guilty of the offense of aggravated assault, causing  
23 temporary but substantial disfigurement, temporary but  
24 substantial loss or impairment of any body organ or part,  
25 or a fracture of any body part as alleged in count one of

1 the indictment.

2 Counsel, are there any corrections or additions  
3 to the instructions as read?

4 MR. DIEBOLT: No, Your Honor.

5 MR. KLEIN: Yes, if we can approach.

6 THE COURT: Yes, please.

7

8 ((Whereupon there is an on-the-record bench  
9 conference.))

10

11 MR. KLEIN: I will confess to perhaps going  
12 senile but I would have sworn that in one of the packets  
13 that we received there was a credibility of witnesses  
14 based on a prior felony conviction/guilty plea that isn't  
15 in the Court's final instructions.

16 THE COURT: It isn't and I don't think it ever  
17 was.

18 MR. KLEIN: Then I have gone senile. I would  
19 just ask that the Court indicate that an additional factor  
20 for the jury to consider is whether the witness has been  
21 convicted of a felony or has pled guilty and then indicate  
22 that the Court will provide an additional written  
23 instruction to that effect, and I have no objection to the  
24 RAJI being used.

25 THE COURT: It wasn't one you submitted so it

1 won't be in that packet?

2 MR. KLEIN: Right. I would have to check but I  
3 don't think so.

4 THE COURT: I don't think so. Okay, I will just  
5 have to be extemporize here.

6 MR. KLEIN: I really think all the Court needs to  
7 say is what I had indicated.

8 THE COURT: Okay, I will give it a shot.

9 MR. KLEIN: Thank you.

10

11 ((End of bench conference.))

12

13 THE COURT: Ladies and Gentlemen, you are further  
14 instructed that any evidence that a witness has been  
15 convicted or pled guilty to any offense that has been  
16 related to you through the testimony may be considered  
17 when you consider and evaluate the witness's credibility  
18 as a witness.

19 Anything else, counsel?

20 MR. KLEIN: No, Your Honor.

21 MR. DIEBOLT: No, Judge.

22 THE COURT: All right. Ladies and Gentlemen, as  
23 we said at the start of the trial there will be only eight  
24 of you who actually deliberate and reach a verdict and  
25 there are nine of you, and that is as we explained earlier



1 because one of you is an alternate juror. The identity of  
2 that person has not yet been determined and I will ask the  
3 clerk to draw one of your names at random and that will be  
4 the alternate juror.

5 THE CLERK: Juror number three.

6 THE COURT: All right. That would be you, Mr.  
7 Benjamin. It is always with some mixed feelings that we  
8 identify the alternate because you have devoted as much  
9 time as anybody else to the matter and you have been very  
10 attentive as well as everyone else. And now you are most  
11 likely not going to be deliberating. But as we explained  
12 earlier, it is very important to have an alternate in case  
13 one of the jurors becomes unable to complete jury service  
14 for whatever reason, that would have allowed us to  
15 continue the trial without starting all over.

16 You will not be able to join the rest of the  
17 jurors in the jury deliberation room. Have you left some  
18 personal belongings in the room?

19 JUROR BENJAMIN: No.

20 THE COURT: If you will leave a phone number with  
21 the bailiff, then he will call you as soon as there is a  
22 verdict. We ask that you still maintain the admonition  
23 about not discussing the case until you get that call that  
24 there has been a verdict because there is still some  
25 slight possibility that one of the jurors will not be able

1 to complete the deliberations, and if that were to happen  
2 we would call back in to rejoin the jury, and that's why  
3 we ask that you still not discuss the case.

4 Ladies and Gentlemen, at this stage there are  
5 some important changes that occur. First of all I have  
6 been telling you not to discuss the case with each other  
7 or with anyone else. And now it becomes your  
8 responsibility to discuss the case with each other but not  
9 with anyone else. Your ability to discuss and your  
10 obligation to discuss it with each other occurs only if  
11 two conditions are met. The first is that all eight of  
12 you must be present together.

13 And secondly, you must all be present in the jury  
14 deliberation room.

15 So for instance if the bailiff has you lined up  
16 in the hallway waiting to unlock the door to let you into  
17 the jury room, even though you are all there, you can't  
18 discuss the case outside the room.

19 Once you are inside the room, if one of you is  
20 using the restroom, you have to wait for that person to  
21 return before you can discuss the case.

22 The second change is that I have also been  
23 telling you when to come and go, setting your schedule.  
24 From now on that becomes your decision collectively. It  
25 is 3:00 o'clock right now, the first thing you ought to do

1 is select a jury foreperson and then if you want to take a  
2 recess you can. The length of the recess is up to you.  
3 Or if you want to begin your deliberations right away,  
4 that's up to you, too.

5 I want to emphasize to you that there is no  
6 restriction on the amount of time you have to decide this  
7 case. You have whatever it takes, whether it's five  
8 minutes, five hours or five days. But there are some  
9 practical considerations that have to be observed. First  
10 is that this building more or less closes down to the  
11 public around 5:00 o'clock so we don't allow jurors to  
12 deliberate beyond 5:00 o'clock. So if you were to reach  
13 that time of day and need more time to deliberate, we  
14 would ask you to return tomorrow morning. And when you  
15 return is up to you to decide. It could be any time after  
16 8:30 in the morning when again the building is more or  
17 less open to the public.

18 Again I'm not trying to suggest that your  
19 deliberations ought to take any particular time, you have  
20 whatever it takes. The only thing I ask is when you make  
21 these scheduling decisions, let the bailiff know so he can  
22 let the rest of us know so we can meet your schedule.

23 So at this time I will ask the clerk to swear the  
24 bailiff.

25

1                   ((Whereupon the bailiff is sworn.))

2

3                   THE COURT: Ladies and Gentlemen, you should now  
4 retire to deliberate, take with you your own notes that  
5 you took during the trial as well as the Court's  
6 instructions. You will be under the guidance of the  
7 bailiff.

8                   The record will show the absence of the jury,  
9 the presence of counsel and the defendant. Counsel, I  
10 would ask as we usually do that you stay within five  
11 minutes of the courthouse in case there is a question or a  
12 verdict is reached. And give us a phone number so you can  
13 be reached with the bailiff.

14                  And Mr. Klein, would you like the Court to  
15 search out the RAJI instruction and include it in writing  
16 and have that delivered to the jury?

17                  MR. KLEIN: I would, Your Honor. Either that or  
18 I can do it as soon as I get back to the office.

19                  THE COURT: I think we can find it without much  
20 trouble, whatever the RAJI is on that subject.

21                  All right. Anything else?

22                  MR. KLEIN: One final thing and then I promise at  
23 least for the time being to make no more comments. And  
24 that is to make a request for a mistrial based on Mr.  
25 Diebolt's closing arguments. Number one, I objected to

1 the comment that he made and the Court sustained it about  
2 his personal experience. After that was sustained he then  
3 basically said anybody who gets hit in the face is  
4 disoriented, et cetera, again, and I think the Court  
5 overruled that one.

6 THE COURT: Because he didn't relate it to any  
7 personal experience.

8 MR. KLEIN: But regardless it is still him  
9 testifying. There was no evidence and he had medical  
10 personnel who could have said any time you are hit in the  
11 face you are disoriented, but there was no evidence.

12 In addition during his argument he talked about,  
13 well, if you don't follow the rules within the prison  
14 system, that will lead to anarchy; that's an improper  
15 argument as well. That is like saying, if you don't  
16 convict him, crime is going to run rampant on the streets  
17 of Tucson.

18 And then finally when he said that there was  
19 nothing to contradict that Jeffrey Wood hit Mr. Schwartz,  
20 number one, that's a comment on Mr. Wood's failure to  
21 testify. And number two, that is shifting the burden.

22 THE COURT: All right. The Court notes the  
23 motions for mistrial and denies them.

24 Anything else?

25 MR. KLEIN: No, Your Honor.

1 THE COURT: The Court will be in recess.

2

3 ((Whereupon a recess is taken in this matter and  
4 then the trial proceeds as follows.))

5

6 THE COURT: The record will show the presence of  
7 counsel and the defendant. You may bring in the jury.  
8 Mr. Klein, did you see the added instruction?

9 MR. KLEIN: I did, and I have no objection to it.

10 THE COURT: That for the record was numbered  
11 instruction 17 that was added in writing after the jury  
12 was verbally instructed.

13 THE BAILIFF: Your Honor, the jury.

14 THE COURT: Please be seated. The record will  
15 show the presence of the jury, counsel and the defendant.

16 Ms. Foley, are you the jury foreperson?

17 THE FOREPERSON: I am.

18 THE COURT: Has the jury reached a verdict?

19 THE FOREPERSON: They have.

20 THE COURT: Would you please hand the verdict  
21 form to the bailiff, please.

22 The clerk will read and record the verdict.

23 THE CLERK: Omitting the formal caption, we the  
24 jury duly impaneled and sworn in the above entitled action  
25 upon our oaths do find the defendant, Jeffrey Allen Wood,

1 guilty of the offense of aggravated assault, causing  
2 temporary but substantial disfigurement, temporary but  
3 substantial loss or impairment of any body organ or part,  
4 or a fracture of any body part, as alleged in count one of  
5 the indictment. Signed foreperson.

6 Members of the jury, is this the verdict and the  
7 verdict of each of you?

8 MEMBERS OF THE JURY: Yes, it is.

9 THE COURT: Do either counsel wish to poll the  
10 jury?

11 MR. KLEIN: Yes, Your Honor.

12 THE COURT: Ladies and Gentlemen, the clerk will  
13 ask each of you a question and your answer ought to be  
14 either yes or no.

15 THE CLERK: Juror number one, is this your  
16 verdict?

17 JUROR NUMBER ONE: Yes.

18 THE CLERK: Juror number two, is this your  
19 verdict?

20 JUROR NUMBER TWO: Yes.

21 THE CLERK: Juror number four, is this your  
22 verdict?

23 JUROR NUMBER FOUR: Yes.

24 THE CLERK: Juror number five, is this your  
25 verdict?

1 JUROR NUMBER FIVE: Yes.

2 THE CLERK: Juror number six, is this your  
3 verdict?

4 JUROR NUMBER SIX: Yes.

5 THE CLERK: Juror number seven, is this your  
6 verdict?

7 JUROR NUMBER SEVEN: Yes.

8 THE CLERK: Juror number eight, is this your  
9 verdict?

10 JUROR NUMBER EIGHT: Yes.

11 THE CLERK: Juror number nine, is this your  
12 verdict?

13 JUROR NUMBER NINE: Ye

14 THE COURT: Ladies and Gentlemen, on behalf of  
15 all the participants in the trial we thank you very much  
16 for your service to the community by serving on this jury.  
17 Your service is now at an end, the admonition is lifted,  
18 you may discuss the case with whoever you wish. If  
19 somebody asks you about it and you don't want to talk  
20 about it, simply tell them that and they will honor your  
21 wishes.

22 Leave with the bailiff your juror badges and also  
23 your notebooks that you took notes in and he will destroy  
24 the notes and we will use those pads for other trials as  
25 we will with the jury badges. Thank you once again.



1           The record will show the absence of the jury and  
2 the presence of counsel and the defendant.

3           The Court orders a pre-sentence report be  
4 prepared by the Adult Probation Department.

5           Mr. Klein, I would propose to set the sentencing  
6 for the 15th of June if that's a date that is acceptable  
7 to you.

8           MR. KLEIN: Yes, and we would waive time, Your  
9 Honor.

10          MR. DIEBOLT: Judge, the only other factor would  
11 be setting a priors trial, there is an allegation of three  
12 priors, I believe three. I will have to double check.

13          THE COURT: Okay. Well, I could do that this  
14 Friday at 10:30.

15          MR. DIEBOLT: Could you give me just a second.

16          THE COURT: Sure.

17          MR. DIEBOLT: That would be fine. I am pretty  
18 sure that whoever my witness would be would be available  
19 but if I could go back and double check and if that was an  
20 issue I could contact the Court and counsel.

21          THE COURT: Okay. Otherwise the Court won't be  
22 available for a couple of weeks and so if we can, I would  
23 just as soon get it done within that time.

24          Mr. Klein, is your client going to contest the  
25 priors?

1 MR. KLEIN: Yes.

2 THE COURT: And the State's intending to go  
3 forward, you have charged three and you intend to go  
4 forward on three?

5 MR. DIEBOLT: There is a penitentiary pack that  
6 was disclosed and on that pen pack are three listed  
7 separate CR's, I think that's what we alleged, three.

8 THE COURT: Just so the Court and defense counsel  
9 have notice of what you actually intend to proceed on.

10 MR. DIEBOLT: Give me just one second. There  
11 might have been four alleged but whether it's four or  
12 three that I proceed on, I don't know exactly.

13 THE COURT: If you would just let counsel and the  
14 Court know before that date.

15 All right. Anything else before we recess?

16 MR. KLEIN: I sorry. The priors trial is this  
17 Friday at 10:30?

18 THE COURT: 10:30, yes. Okay. The Court will be  
19 in recess then. Thank you.

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C E R T I F I C A T E

I, Deirdre Muzall, certify that I took the shorthand notes in the foregoing matter; that the same was transcribed under my direction; that the preceding pages of typewritten matter are a true, accurate and complete transcript of all the testimony adduced, to the best of my skill and ability.

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Deirdre Muzall, RDR, #50012  
Certified Court Reporter